TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~284.~~ 88

THE STEAMSHIP WESTERN METROPOLIS, HIRAM BENNER, CLAIMANT,

vs.

JOHN LOW, JR., APPELLANT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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INDEX.

	Original.	Print.
Clerk's certificate	*a*	1
Libel	1	1
Stipulation for libellant's costs	7	3
Monition	9	3
Claim of owner	11	4
Stipulation	13	5
Stipulation	15	6
Answer	20	7
Hearing of cause	21	8
TESTIMONY FOR LIBELLANTS.		
John Pentecost, for libellants	27	9
Diagram	34	12
Alexander McDougal for libellants	46	15
John E. Thompson	57	19
Elisha O. Crowell	64	21
Emerson Colby	67	22
Diagram	72	23
Eben D. Campbell	73	23
John Low, jr	78	24
Marcus L. Woodhull	80	25
Franklin Clark	82	26
William T. Taylor	82	26
Lemuel Brown	83	26
E. D. Campbell, (recalled)	83	26
Thomas Wood	84	26
Elisha H. Daggett	87	27

	Original.	Print'
William B. Hilton	91	28
Charles W. Adams	95	30
Samuel Adams	99	31
Interrogatories, decree, and order	103	32
Commissioner's report	105	33
Final decree in rem, &c	107	33
Notice of appeal	109	34
Bond for costs and damages on appeal	113	35
Hearing of case on appeal	115	36
Final decree in United States circuit court	117	36
Petition of appeal	121	38
Bond for costs on appeal	123	38
Citation on appeal	127	39

a UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Kenneth G. White, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to 128, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of John Low, jr., against The Steamer Western Metropolis, her tackle, &c., as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 4th day of Nov'r, in the year of our Lord one thousand eight hundred and seventy, and of the independence of the said United States the ninety-fifth.

[SEAL.] KENNETH G. WHITE, *Clerk.*

[Five-cent internal revenue stamp affixed and cancelled.]

1 At a stated term of the district court of the United States of America, for the southern district of New York, held at the United States court-rooms, in the city of New York, on the 4th day of June, in the year of our Lord one thousand eight hundred and sixty-eight.

Present, the honorable Samuel Blatchford, district judge.

JOHN LOW, JR.,
vs.
THE STEAMER WESTERN METROPOLIS, HER tackle. } 18,361.

1864, August 6th.—The libellant files his libel in the words and figures following, to wit:

To the honorable Samuel R. Betts, judge of the district court of the United States for the southern district of New York:

The libel and complaint of John Low, jr., owner of the schooner "Triumph" and her cargo, against the steamer "Western Metropolis," her tackle, apparel, and furniture, in a cause of collision, civil and mari*n*tine, alleges as follows:

First. That this is an action founded upon mari*n*tine tort, and the said steamer "Western Metropolis" is now within the southern district of New York.

Second. That on or about the 17th day of March, A. D. 1864, the schooner "Triumph," then wholly owned bythe libellant, & laden
2 with a cargo of fish, also wholly owned by the libellant, was proceeding on a voyage to New York, and had arrived at a point in the neighborhood of Nantucket Shoals; that the tide at the time was flood, and the wind fresh northwest by west, and the starlight clear; that the said schooner, being then beating up, and having gone as far as it was safe to go towards the Horse Shoe, tacked and stood over upon a course about west-southwest, close-hauled upon her starboard tack, and going about six knots an hour; that the said steamer "Western Mitropolis" was then bound to the eastward, from New York, going about thirteen knots an hour, and with a tide of four or five knots, and upon a course such that, if the steamer had kept her course, she would have
3 passed astern of the schooner, and without any danger whatever of

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Samuel Adams	99	31
Interrogatories, decree, and order	103	32
Commissioner's report	105	33
Final decree in rem, &c	107	33
Notice of appeal	109	34
Bond for costs and damages on appeal	113	35
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Southern District of New York, ss:

I, Kenneth G. White, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to 128, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of John Low, jr., against The Steamer Western Metropolis, her tackle, &c., as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 4th day of Nov'r, in the year of our Lord one thousand eight hundred and seventy, and of the independence of the said United States the ninety-fifth.

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Present, the honorable Samuel Blatchford, district judge.

JOHN LOW, JR., *vs.* THE STEAMER WESTERN METROPOLIS, HER tackle. } 18,361.

1864, August 6th.—The libellant files his libel in the words and figures following, to wit:

To the honorable Samuel R. Betts, judge of the district court of the United States for the southern district of New York:

The libel and complaint of John Low, jr., owner of the schooner "Triumph" and her cargo, against the steamer "Western Metropolis," her tackle, apparel, and furniture, in a cause of collision, civil and mar*in*tine, alleges as follows:

First. That this is an action founded upon mar*intine* tort, and the said steamer "Western Metropolis" is now within the southern district of New York.

Second. That on or about the 17th day of March, A. D. 1864, the schooner "Triumph," then wholly owned bythe libellant, & laden
2 with a cargo of fish, also wholly owned by the libellant, was proceeding on a voyage to New York, and had arrived at a point in the neighborhood of Nantucket Shoals; that the tide at the time was flood, and the wind fresh northwest by west, and the starlight clear; that the said schooner, being then beating up, and having gone as far as it was safe to go towards the Horse Shoe, tacked and stood over upon a course about west-southwest, close-hauled upon her starboard tack, and going about six knots an hour; that the said steamer "Western Mitropolis" was then bound to the eastward, from New York, going about thirteen knots an hour, and with a tide of four or five knots, and upon a course such that, if the steamer had kept her course, she would have
3 passed astern of the schooner, and without any danger whatever of

a collision with the schooner; that the course of said schooner was not changed, but she continued on her said starboard tack, being then in a proper track, having a clear light burning in her rigging, and plainly visible to the persons in charge of said steamer; that the said steamer did not hold her course, or make proper efforts to avoid said schooner, but, on the contrary, when near said schooner, changed to a course nearly southeast, and without materially slackening her speed, and ran into *an* afoul of said schooner, striking her upon the starboard side, near the fore rigging, and causing her to sink almost instantly, and killing several of her crew.

Third. That, at the time of said accident, the said schooner was well manned, & had a competent lookout stationed in a proper place and attentive to that duty, and everything proper to be done on the part of said schooner, to avoid said steamer, was done, and said
4 accident was caused by no want of care or skill on the part of said schooner.

Fourth. That the said steamer was not properly navigated and had no proper lookout, and did not follow the usual and proper track for steamers in that locality, and improperly changed her course, and ran towards and into said schooner in a most careless manner, and said loss of said schooner and cargo was caused solely by the fault and mismanagement of those on board of said steamer, which vessel was bound, under the circumstances, to have seen, and, in time, avoided said schooner, and could easily have done so.

Fifth. That the value of said schooner, at the time of said accident, was not less than the sum of ten thousand dollars, and the value of the cargo was at least the sum of twelve thousand two hundred and ninety-eight dollars, which said property was wholly lost to the libellant by reason of said collision.

5 Sixth. That, all and singular, the premises are true, and within the admiralty and mari*ntine* jurisdiction of this honorable court, and the libellants claim a *a* lien upon the said steamer for the amount of the damages by him sustained by reason of said collision, which is at least the sum of twenty-two thousand two hundred and ninety-eight dollars, besides interest.

Whereupon the libellants pray that process in due form of law may issue against the said steamer "Western Metropolis," her tackle, &c., and that all persons having or pretending to have any interest therein may be compelled to appear and answer upon oath, all and singular, the matters herein propounded, and that this honorable court would be pleased the said steamer to pay the libellant's claim, with interest and costs.

CHAS. L. BENEDICT,
Proctor.

Sworn to before me this 6th day of August, 1864.

JOHN A. OSBORN,
U. S. Com'r.

[U. S. 5-c. int. rev. stamp cancelled.]

6 BENEDICT, BURR & BENEDICT, *Proctors.*
E. C. BENEDICT, *Advocate.*

(Endorsed:) 18,361. U. S. district court. John Low, jr., *vs.* The steamer "Western Metropolis," her tackle, &c. Libel. Benedict, Burr & Benedict, proctors. E. C. Benedict, advocate. Filed Aug. 6th, 1864.

7 *Stipulation for libellant's costs, entered into pursuant to the rules and practice of this court.—Filed the 6th day of Aug.*, 1864.

District Court of the United States for the southern district of New York.

Whereas a libel was filed in this court on the sixth day of August, in the year of our Lord one thousand eight hundred and sixty-four, by John Low, jr., against the steamer "Western Metropolis," her tackle, &c., for the reasons and causes in the said libel mentioned, and praying that said steamer, &c., may be condemned to pay libellant's claim, and the said libellant and James A. Stetson, surety parties hereto, hereby consenting, and agreeing that in case of default or contumacy on the part of the libellant or his suret , execution may issue against their goods, chattels, and lands, for the sum of two hundred & fifty dollars:

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be, and each of them is, bound in the sum of two hundred & fifty dollars, conditioned that the libellant above named shall appear and answer to the cause, and to interrogatories, and shall pay all such costs as shall be awarded against him by this court, or in case of appeal, by the appellate court.

JAMES A. STETSON,
Ag't for John Low, Jr.
JAMES A. STETSON.

Taken and acknowledged this 6th day of August, 1864, before me.
JOHN A. OSBORN,
U. S. Commissioner.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

James A. Stetson, party to the above stipulation, being duly sworn, doth depose and say that he resides in the city of New York, and that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

JAMES A. STETSON.

Sworn to this sixth day of August, 1864, before me.
JOHN A. OSBORN,
U. S. Commissioner.

Recorded the sixth day of August, 1864.
GEO. F. BETTS, *Clerk.*

8

9 SOUTHERN DISTRICT OF NEW YORK, *ss:*

[SEAL.] The President of the United States of America to the marshal of the southern district of New York, greeting:

Whereas a libel hath been filed in the district court of the United States for the southern district of New York, on the sixth day of August, in the year of our Lord one thousand eight hundred and sixty-four, by John Low, jr., own'r of sch'r Triumph & cargo, against the steamer "Western Metropolis," her tackle, collision, $22,298 00, for the reasons and causes in the said libel mentioned, and praying the usual process and monition of the said court in that behalf to be made, and that all persons interested in the said steamer or vessel, her tackle, &c., may be cited in general and special to answer the premises, and all

proceedings being had, that the said steamer or vessel, her tackle, &c., may, for the causes in the said libel mentioned, be condemned and sold to pay the demands of the libellant:

You are, therefore, hereby commanded to attach the said steamer or vessel, her tackle, &c., and to detain the same in your custody, until the further order of the court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said libel, that they be and appear before the said court, to be held in and for the southern district of New York, on the 23d day of August, 1864, at eleven o'clock in the forenoon of the same day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. And what you shall have done in the premises, do you then and there make return thereof, together with this writ.

Witness, the Honorable Samuel R. Betts, judge of the said court, at the city of New York, in the southern district of New York, this sixth day of August, in the year of our Lord one thousand eight hundred and sixty-four and our independence the eighty-ninth.

GEO. F. BETTS, *Clerk.*

BENEDICT, BURR & BENEDICT, *Proctor for Libellant:*

[U. S. int. rev. 50c. stamp, cancelled.]

10 (Indorsed:) Vol. 18, page 36. Southern district of New York. United States district court. John Low, jr., vs. the steamer Western Metropolis, her tackle. Monition ret'ble August 23d, 1864. Benedict, Burr & Benedict, proctor for libellant. Filed August 23d, 1864.

I hereby depute W. Buckley to execute the within process.
Dated Aug. 6, 1864.

R. MURRAY, *U. S. Marshal.*

In obedience to the within monition, I attached the steamship "Western Metropolis," her tackle, therein described, on the 6th day of August, 1864, and have given due notice to all persons claiming the same that this court will, on the 23d day of August, 1864, inst., (if that day should be a day of jurisdiction, if not on the next day of jurisdiction thereafter,) proceed to the trial and condemnation thereof, should no claim be interposed for the same.

R. MURRAY, *U. S. Marshal.*

Dated Aug. 23d, 1864.

11 At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms, in the city of New York, on Tuesday, the sixth day of August, in the year of our Lord one thousand eight hundred and sixty-four.

Present, the Honorable Samuel R. Betts, district judge.

THE STEAMER "WESTERN METROPOLIS," HER tackle, &c.
asm.
JOHN LOW, JR.

And now Hiram Benner, owner of the steamer "Western Metropolis,"

intervening for the interest of himself in the said steamer, appears before the honorable court, and makes claim to the said steamer, &c., as the same are attached by the marshal, under process of this court, at the instance of John Low, jr., and the said Hiram Benner avers that he was in possession of the said steamer at the time of the attachment thereof, and that the person above named is true and bona fide owner of the said steamer, and that no other person is the owner thereof; wherefore he prays to defend accordingly.

HIRAM BENNER.

BEEBE, DEAN & DONAHUE, *Proctor for Claimant.*

Sworn to and subscribed this 9th day of August, A. D. 1864, before me.

JOHN A. OSBORN,
U. S. Commissioner.

12 (Indorsed:) Vol. 18, No. 361. United States district court for the southern district of New York. Steamer Western Metropolis, & her ams. John Low, jr. Beebe, Dean & Donohue, proctors for claimant. Claim of owner. Filed the ninth day of August, 1864.

13 [Respondent's costs.]

Stipulation entered into pursuant to the rules and practice of this court.—Filed the 9th day of August, 1864.

District court of the United States for the southern district of New York.

Whereas, a libel was filed in this court on the sixth day of August, in the year of our Lord one thousand eight hundred and sixty-four, by John Low, jr., against the steamer "Western Metropolis," her tackle, &c., for the reasons and causes in the said libel mentioned, and praying that said steamer, her tackle, &c., may be condemned and sold to pay the demands of said libellant, and the parties hereto hereby consenting that, in case of default or contumacy on the part of the claimant or his surety, execution for the sum of two hundred & fifty dollars may issue against their goods, chattels, and lands;

And whereas, also, a claim has been filed in said cause by Hiram Benner:

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be, and each of them is hereby, bound in the sum of two hundred & fifty dollars, conditioned that the cl't above named shall pay all costs and expenses which shall be awarded against him by the final decree of this court or, upon an appeal, by the appellate court.

HIRAM BENNER.
H. H. WARDEN.

Taken and acknowledged this 9th day of August, 1864, before me.

JOHN A. OSBORN,
U. S. Commissioner.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Henry H. Warden, party to the above stipulation, being duly sworn, doth depose and say, that he resides in the city of Brooklyn; that he

proceedings being had, that the said steamer or vessel, her tackle, &c., may, for the causes in the said libel mentioned, be condemned and sold to pay the demands of the libellant:

You are, therefore, hereby commanded to attach the said steamer or vessel, her tackle, &c., and to detain the same in your custody, until the further order of the court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said libel, that they be and appear before the said court, to be held in and for the southern district of New York, on the 23d day of August, 1864, at eleven o'clock in the forenoon of the same day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. And what you shall have done in the premises, do you then and there make return thereof, together with this writ.

Witness, the Honorable Samuel R. Betts, judge of the said court, at the city of New York, in the southern district of New York, this sixth day of August, in the year of our Lord one thousand eight hundred and sixty-four and our independence the eighty-ninth.

GEO. F. BETTS, *Clerk.*

BENEDICT, BURR & BENEDICT, *Proctor for Libellant:*

[U. S. int. rev. 50c. stamp, cancelled.]

10 (Indorsed:) Vol. 18, page 36. Southern district of New York. United States district court. John Low, jr., vs. the steamer Western Metropolis, her tackle. Monition ret'ble August 23d, 1864. Benedict, Burr & Benedict, proctor for libellant. Filed August 23d, 1864.

I hereby depute W. Buckley to execute the within process.
Dated Aug. 6, 1864.

R. MURRAY, *U. S. Marshal.*

In obedience to the within monition, I attached the steamship "Western Metropolis," her tackle, therein described, on the 6th day of August, 1864, and have given due notice to all persons claiming the same that this court will, on the 23d day of August, 1864, inst., (if that day should be a day of jurisdiction, if not on the next day of jurisdiction thereafter,) proceed to the trial and condemnation thereof, should no claim be interposed for the same.

R. MURRAY, *U. S. Marshal.*

Dated Aug. 23d, 1864.

11 At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms, in the city of New York, on Tuesday, the sixth day of August, in the year of our Lord one thousand eight hundred and sixty-four.

Present, the Honorable Samuel R. Betts, district judge.

THE STEAMER "WESTERN METROPOLIS," HER tackle, &c.
asm.
JOHN LOW, JR.

And now Hiram Benner, owner of the steamer "Western Metropolis,"

intervening for the interest of himself in the said steamer, appears before the honorable court, and makes claim to the said steamer, &c., as the same are attached by the marshal, under process of this court, at the instance of John Low, jr., and the said Hiram Benner avers that he was in possession of the said steamer at the time of the attachment thereof, and that the person above named is true and bona fide owner of the said steamer, and that no other person is the owner thereof; wherefore he prays to defend accordingly.

HIRAM BENNER.

BEEBE, DEAN & DONAHUE, *Proctor for Claimant.*

Sworn to and subscribed this 9th day of August, A. D. 1864, before me.

JOHN A. OSBORN,
U. S. Commissioner.

12 (Indorsed:) Vol. 18, No. 361. United States district court for the southern district of New York. Steamer Western Metropolis, & her ams. John Low, jr. Beebe, Dean & Donohue, proctors for claimant. Claim of owner. Filed the ninth day of August, 1864.

13 [Respondent's costs.]

Stipulation entered into pursuant to the rules and practice of this court.—Filed the 9th day of August, 1864.

District court of the United States for the southern district of New York.

Whereas, a libel was filed in this court on the sixth day of August, in the year of our Lord one thousand eight hundred and sixty-four, by John Low, jr., against the steamer "Western Metropolis," her tackle, &c., for the reasons and causes in the said libel mentioned, and praying that said steamer, her tackle, &c., may be condemned and sold to pay the demands of said libellant, and the parties hereto hereby consenting that, in case of default or contumacy on the part of the claimant or his surety, execution for the sum of two hundred & fifty dollars may issue against their goods, chattels, and lands;

And whereas, also, a claim has been filed in said cause by Hiram Benner:

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be, and each of them is hereby, bound in the sum of two hundred & fifty dollars, conditioned that the cl't above named shall pay all costs and expenses which shall be awarded against him by the final decree of this court or, upon an appeal, by the appellate court.

HIRAM BENNER.
H. H. WARDEN.

Taken and acknowledged this 9th day of August, 1864, before me.

JOHN A. OSBORN,
U. S. Commissioner.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Henry H. Warden, party to the above stipulation, being duly sworn, doth depose and say, that he resides in the city of Brooklyn; that he

is worth the sum of five hundred dollars, over and above all his just debts and liabilities.

H. H. WARDEN.

Sworn to this 9th day of August, 1864, before me.

JOHN A. OSBORN,
U. S. Commissioner.

Recorded the 9th day of August, 1864.

G. F. B., *Clerk.*

14

15 *Stipulation entered into pursuant to the rules and practice of this court.—Filed the 9th day of August,* 1864.

District court of the United States for the southern district of New York, in admiralty.

Whereas, a libel was filed on the sixth day of August, in the year of our Lord one thousand eight hundred and sixty-four, by John Low, jr., against the steamer Western Metropolis, her tackle, &c., for the reasons and causes in the said libel mentioned;

And whereas, the said steamer, her tackle, &c., in the custody of the marshal, under the process issued in pursuance of the prayer of said libel, & whereas it has been agreed that the said steamer, her tackle, &c., be discharge from custody on the claimant's executing stipulations for costs and value, the latter in the sum of forty thousand six hundred dollars, as appears from said consent now on file in said court; and the parties hereto hereby consenting and agreeing that in case of default or contumacy on the part of the claimant, or his surety, execution for the above amount may issue against their goods, chattels, and lands:

Now, therefore, the condition of this stipulation is such, that if the stipulator undersigned shall at any time, upon the interlocutory or final order or decree of the said district court, or of any appellate court to which the above-named suit may proceed, and upon notice of such order or decree to Beebe, Dean & Donohue, esquires, proctors for the claimant of said steamer, her tackle, &c., abide by and pay the money awarded by the final decree rendered by the court, or the appellate court if any appeal intervene, then this stipulation to be void; otherwise to remain in full force and virtue.

HIRAM BENNER.
H. H. WARDEN.

Taken and acknowledged this 9th day of August, 1864, before me.

JOHN A. OSBORN,
U. S. Commissioner.

16 SOUTHERN DISTRICT OF NEW YORK, *ss:*

Henry H. Warden, part to the above stipulation, being duly sworn, deposes and says that *that* he resides in the city of Brooklyn; that he is worth the sum of forty thousand six hundred dollars, over and above all his just debts and liabilities.

H. H. WARDEN.

Sworn to this 9th day of August, 1864, before me.

JOHN A. OSBORN,
U. S. Commissioner.

Recorded this 9th day of August, 1864.

17 To the honorable Samuel R. Betts, judge of the district court of the United States for the southern district of New York:

The answer of Hiram Benner, claimant of the steamer "Western Metropolis," her engines, boilers, tackle, apparel, &c., to the libel of John Low, jr., owner of the schooner "Triumph," respectfully shows—

First. That the claimant has duly intervened and claimed said steamer "Western Metropolis," and the same has, on bonds given by him, been duly delivered to him.

Second. And claimant and respondent, answering, says that he admits that at the time of the filing of the libel said steamer was in the southern district of New York.

Third. Claimant and respondent, further answering, says that as to what cargo the said schooner "Triumph" had, if any, or who owned the same, or to what place the said schooner was proceeding, the claimant, being ignorant, denies the said statements that he admits that
18 the vessel at the time of the collision was about —— miles from Nantucket Shoals, and admits that the wind was from the quarter stated, but denies the other statements of the second article of the libel, except that he admits that the steamer was proceeding to Boston, Mass.; and he further alleges, that at and before the time of the collision, the said steamer was properly manned, tackled, and appareled, with proper lights and lookout, and was proceeding on the due course of her voyage; that although the said steamer's lights were in plain sight and could have been easily seen from the schooner, the said schooner once crossed the track of the steamer and was about again crossing it, and could have done so, but she changed her course, and that as soon as the said schooner could, with all proper caution, be seen from the steamer, said steamer was stopped, and backed, and every exertion made to avoid the collision.

19 Fourth. That the claimant and respondent, further answering, on information and belief, deny all the statements in the third article of the libel and each of them.

Fifth. That the claimants and respondents, further answering, on information and belief, deny all the statements in the fourth article of the libel, and allege that the collision occurred through the fault and want of care and caution of those on the said schooner.

Sixth. And claimant and respondent, further answering, says, that having no knowledge or information in regard to the matters stated in the fifth article of the libel, deny the same.

Seventh. That all and singular the premises are true, and in all matters not herein admitted or which are denied in this answer, the libel is untrue.

Whereupon the claimant prays that the court would be pleased to pronounce against the claim of the libellants, and to order and
20 decree that the libel be dismissed with costs to be taxed, or for such relief or order in the premises as may be just.

LEMUEL BROWN.

Sworn to before me this 27th day of February, 1865.

JNO. T. McGOWAN,
Notary Public City and County of New York.

(Indorsed:) 18—361. U. S. district court. The st'r "Western Metropolis," her tackle, &c., ads. John Low, jr. Answer. Beebe, Dean & Donohue, proctors. Filed Feb'y 27, 1865.

21 At a stated term of the district court of the United States of America, for the southern district of New York, held at the United States court-rooms, in the city of New York, on Tuesday, the 21st day of April, in the year of our Lord one thousand eight hundred and eight:

Present, the Honorable Samuel Blatchford, district judge.

JOHN LOW, JR., *vs.* THE STEAMER "WESTERN METROPOLIS," her tackle, &c. } 18—361.

This cause being called in its order, the day-docket, ordered hearing.

Evidence for libellants:

Deposition of John Penticost ..... Read.
" Alexander McDougal ..... "
" Emanuel Thompson ..... "
" Elisha O. Crowell ..... "
" Emerson Colby ..... "
Eben D. Campbell ..... Sworn.
John Low jr ..... "

Evidence for claimants:

William A. Lighthall ..... "
Marcus L. Woodhull ..... "
Franklin Clark ..... "
William T. Taylor ..... "
Dep't of Elisha H. Daggett ..... Read.
" William B. Hilton ..... "
" Charles W. Adams ..... "
" Samuel Adams ..... "
Lemuel Brown ..... Sworn.

Eve. for libellant:

Eben D. Campbell ..... Recalled.

Mr. Benedict argues for libellants.
" Beebe argues " cl'ts.
Cause adj. till 11 a. m. to-morrow. (Over.)

22 (Forward.) April 23, cause cont'd.

Mr. Donohue moves that the testimony of the claimants' look-out be admitted in evidence, and is heard in favor thereof.

Mr. E. C. Benedict is heard in opposition to the motion.

Motion granted.

Thomas Wood sworn.

C. A. V.

23 District court of the United States for southern district of New York.

JOHN LOW, JR., *vs.* THE STEAMER "WESTERN METROPOLIS." } Notice.

SIRS: Please to take notice that John Penticost, who lives at a greater distance from the place of trial of the above cause than one hundred miles, and about to go out of said district and to a greater distance from the place of trial than one hundred miles, before the time of trial, will be examined (de bene esse) on the part of the libellant, before me, (a commission duly appointed by the circuit court of the

United States for the southern district of New York,) under and by virtue of the acts of Congress in such case made and provided, at my office, at No. 74 Wall street, in the city of New York, on the 4th
24 day of May, 1866, at 2 o'clock in the afternoon of that day, at which time and place you are hereby notified to be present, and to put interrogatories, if you shall think fit.

Dated New York, the 3d day of May, A. D. 1866.

Yours, &c.,

CHA'S N. NEWTON,

United States Commissioner, duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit.

To BEEBE, DEAN & DONOHUE, Esq'rs,
Cl'm't's Proctors.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

W'm D. Jones, being duly sworn, says, that on the 3d day of May, 1866, he served the annexed notice on Beebe, Dean & Donohue, Esq'rs, claimant's proctors in the above cause, by delivering a copy of the same to Mr. Donohue, one of the said firm, personally.

W'M D. JONES.

Sworn to before me this day of May, 1866.

25 U. S. dist. court.

JOHN LOW, JR.
vs.
THE STEAMSHIP WESTERN METROPOLIS.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Robert D. Benedict, of said district, being duly sworn, says, he is one of the libellant's proctors herein; that John Pentecost is a material and necessary witness for the libellant herein; that he resides more than a hundred miles from the city of New York, is a seafaring man, and is about to leave this district.

R. D. BENEDICT.

Sworn to before me this 3d May, 1866.

W'M D. JONES,
Notary Public, N. Y. City.

26

27 UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK,
City, County, and State of New York, ss:

Be it remembered, that on this 4th day of May, in the year of our Lord one thousand eight hundred and sixty-six, I, Charles N. Newton, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act, in addition to an act, entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed Sep-

tember 24th, 1789, did call, and cause to be and personally appear before me, at my office, 74 Wall street, in the city of New York, in the said southern district of New York, in the State aforesaid, John Penticost, to testify and the truth to say on the part and behalf of the libellant, in a certain suit or matter of controversy now depending and undetermined in the district court of the United States for the southern district of New York, in the district aforesaid, wherein John Low, jr., agst. The Steamer Western Metropolis:

And the said John Penticost being about the age of twenty-two years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said John Penticost, and he did thereupon depose, testify, and say as follows, viz:

I am a seafaring man, and about to proceed on a voyage to sea. I reside in Gloucester, Mass., which is over one hundred miles from this city of New York. I am now on board the schr. Flying Fish, as mate, bound back to Gloucester, or Boston. I have followed the water since I was ten years of age, a greater part of the time. I was in the schooner Triumph at the time she was lost; I was before the mast; I was an able seaman; I had been in her from Tuesday morning before she
28 was lost. She was bound from Gloucester to New York. She was loaded full at the time.

Q. How was she lost?

A. She was lost by being run down by the steamer "Western Metropolis."

Q. Where?

A. Within about a quarter of a mile of the Cross Rip light-boat, which is near the Nantucket Shoals.

Q. What time in the year?

A. March, 1864.

Q. What did your vessel's crew consist of?

A. Capt., mate, steward, and three seamen.

Q. Did you see the collision?

A. Yes, sir.

Q. How was the night?

A. Fine night; clear starlight; a few northern lights.

Q. What watch was you in?

A. Captain's.

Q. Who else composed that watch?

A. Myself and a seaman by the name of Miller.

Q. When was that watch on deck?

29 A. Twelve at midnight to four in the morning.

Q. Was there any lookout on your vessel?

A. Yes, sir; myself and Miller.

Q. Where did you stand?

A. Forward of the foresail.

Q. Which side of the jib?

A. One on the lee bow, and one on the weather bow.

Q. Where these the proper places for the lookout?

A. Yes, sir.

Q. Who reported the steamer?

A. I did.

Q. Where was she then?

A. She was a little on our starboard bow.

Q. How far off did she appear to be?

A. She appeared to be a good piece off; as far off so as to be able to see her lights, and we saw that she was a steamer.

Q. Which way was the wind?

A. Northwest by west.

Q. What lights did you see?

A. The high-light, and bow-light, both white lights.

Q. What did you report?

30 A. I said, "Captain, there is a steamer coming;" that is the words.

Q. Did the capt. reply to that?

A. Yes; he said, "Where is she?" or some such word. I said she is about ahead of us. I pointed with my finger to where she was, and said, "There she is."

Q. Where was the captain?

A. At the wheel.

Q. How far was you from the wheel?

A. I suppose I was sixty or seventy feet.

Q. Did you see any colored lights?

A. I did not, when I first saw her, but when she came down near us, I did.

Q. What lights did you see then?

A. Both the green and the red.

Q. Can you tell what course the schooner was heading then?

A. I can't tell exactly. Somewhere from west by south to west-south-west.

Q. Did you have any light on the schooner?

A. Yes, sir; on the starboard forerigging.

Q. Are you positive it was up?

A. Yes, sir.

31 Q. Did you notice whether it was burning?

A. Yes, sir; bright.

Q. Do you know who put it up?

A. Yes, sir; I put it up, myself, just about the time the moon was going down. The capt. told me to put it up when the moon went down.

Q. How long before the collision did you put the light up?

A. An hour or more before the collision, I think.

Q. Did you see the Cross Rip light?

A. Yes, sir; it was a little on the starboard bow.

Q. Further off than the steamer?

A. The light-boat was not so far off as the steamer when I saw the steamer first.

Q. How did she come into you?

A. About head first; she butt us a little, glancing our bow?

Q. Where did she butt you?

A. About the forerigging, on the starboard side.

Q. Had you tacked before this?

A. Yes; but I can't tell exactly how long.

Q. Was it before you saw the steamer?

32 A. Just after we tacked, we saw the steamer.

Q. That was your last tack, was it, before the collision?

A. Yes, sir.

Q. What tacks had you then aboard?

A. We had the starboard tacks aboard; the wind was on our starboard side.

Q. After that, before the collision, did the schooner change her course?

A. No, sir.

Q. Who was on the deck of the schooner just before and at the time of the collision?

A. All hands, except the steward, and he was in his bunk.

Q. Where are they now?

A. Two were drowned, Pearce and Miller, by the collision. The captain and mate are in Mass., as I understand.

Q. How came those two men to be drowned?

A. They were on deck. I suppose it was their lot.

Q. Where did they stand?

33 A. Miller stood beside me, just at the time of the collision, within an instant of the collision. At that instant I started and run aft, and I never saw him again. I couldn't tell where Pearce stood. I saw him on deck. I believe he stood just a little behind me—a little aft of me. I know I said, "Boys, if we stand here we will be killed." I suppose I saw him, because I know he was near enough to hear it.

Q. What became of you?

A. I went aft just as far as the main hatch, and I see I could not get any farther, and then I stood there and saw her strike. After then when I picked myself up I found myself in the lee scuppers; things were knocking around there pretty lively. When I got up out of the scuppers I hove off my and ran to the weather rail, and caught hold of the steamer what I called gudgeons. I don't know what they are called. I took hold there, and the thought came over me that

34 if I kept hold there there would *would* be no way to get off, as the steamer was going fast, so I let go just about as quick as I took hold. I started aft then, and said to the captain, we will cut away the boat, and he said our boat is all broke. The captain said, "Be cool, or careful, boys, and take main rigging. He went ahead and we followed him, and there we remained until the boat from the steamer came and took us off.

Q. What became of the schooner?

A. She sank in about two minutes.

Q. Which side of the steamer did you see at the time of the collision?

A. Port side.

Q. When she struck your vessel, did it make any crash?

A. Yes, sir; pretty loud crash.

Q. When the steamboat was coming towards you, after you saw her, did you see any sign of her changing her course?

A. Yes, sir.

Q. What?

(Here follows diagram, marked page 34.)

35 A. Just before she hit us I saw her swing off to her right.

Q. Would that be the effect of porting her helm?

A. Yes, sir.

Q. Did she appear to swing off much or little?

A. She did not swing a great deal before she hit; she appeared to swing fast; I saw a change in her lights, as she was coming down to us; we saw both her colored lights, red and green, and then just lost sight of her red light for an instant—just long enough to say we lost sight of it; then it came right in sight, and we lost sight of the green light.

Q. How far off was the steamer when you lost sight of the green light?

A. Not a great ways; probably a hundred yards; not much under or over that.

Q. Was there any hail from any quarter?

A. No, sir; only when she struck us; did not hear any hail before the collision.

36 Q. When you saw the steamer a hundred yards off, more or less, could you see her plain?

A. I could see her plain then.

Q. Could you see her long before that?

A. Quite a little spell before that. She was a side-wheel; you couldn't tell whether she was a side-wheel or a propeller a great distance off. It was light enough to see the sails of a sailing vessel all of a mile in distance. The schooner was loaded with fish and mackeral. The steamboat stopped for us after the blow; when her boat got us she was a quarter of a mile off from us. I *see* the small boat nearly ten minutes before she reached us. I should think probable the small boat was half way between us and the steamer when I first saw her. The blow from the steamer turned our vessel around.

Cross-examined by Mr. Donohue:

I had no time-piece at the time of the collision. I did not look at
37 any time-piece during any of the periods I have mentioned. After I saw the steamer I looked at the time-piece on our vessel and it was four o'clock; did not look at the time-piece after that. The steamer's boat that came to us did not have a light; I am sure of that; if there had been a light on the small boat I would have seen it; I was looking right at the small boat. It was about an hour from the time the steamboat struck us that we were on board of the steamboat. Our boat had sunk before the small boat got to us. I was in the main rigging within about eight feet of the cross-trees; the top of the mainmast was not broken, but the topmast was. We kept *hollering* until the small boat got near to us, and then we knocked off *hollering* when they could see where we was. I was the last man that was taken off; we were all in the same rigging that were
38 saved. It was probably ten minutes from the time we were taken off before we reached the steamboat; I had no time-piece with me; I had been on deck very near four hours before I saw the steamer. It was about fifteen or twenty minutes from the time I first saw the steamer's bright light before the collision. When we first saw the steamer I should say we were heading from west by south to west-southwest; the wind was about northwest by west—along that way somewhere. I don't suppose we tacked more than three times during the four hours. We had just tacked when I saw the steamer; saw her just after we tacked; we were heading on the prior tack about north, pretty nigh. I went at the wheel; I assisted in tacking; I tended jib-sheets; the capt. was at the helm; the seaman and myself were on the deck. Miller assisted me in tending the jib-sheets. When I first saw the steamer she was a little on our
39 starboard bow.

Q. Can't you tell whether it was as much as two points?

A. I said before I could not tell how many points she bore. I know it was little on our starboard bow.

Q. Can you tell whether it more or less than four points on your starboard bow?

A. I know she was not four points on our starboard bow; any fool could tell that.

Q. Can you tell us no nearer than that?

A. I don't know as I can, and I don't know but I can.

Q. If you can, tell us.

A. I guess she was not more than two points any way. When I saw her colored lights I saw them both at the same time, and I continued to see them both until the time I said the red light went out of view.

Q. From the time you first saw the steamer, until the red light went out of view, as you have stated, did she keep about the same bearing?

40 A. About the same bearing. I remained in the same place where I was—forward on the lookout; did not look about; I was on the starboard side; I reported the light when I first made it; did not report it after that: there was no need of it; every one could see it.

Q. Was anything done on your vessel to avoid the collision?

A. No, sir; there was no alteration in our vessel; she went right along as she did before.

Q. Question repeated?

A. Nothing. I have seen the captain, who is here, before; I thought he was the captain of the steamer; I had a talk with him about the steamer; that is, a little conversation. In the morning that we left the steamer in Boston he was in the captain's room, and he spoke to us all. I don't know that he spoke to me more than the others. I had no talk with the captain in the cabin on the night of the collision, to my knowledge.

41 Q. Did you not tell him that the light was down, trimming it?

A. No, sir; did not tell any one else so.

Q. Did you not tell the captain that if the light had been up it would not have occurred?

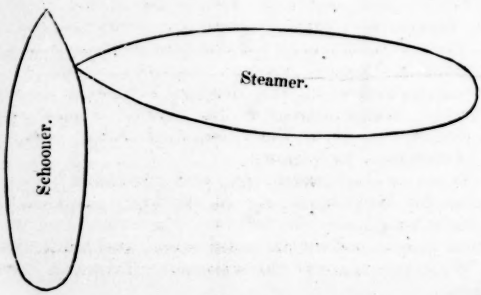
A. No, sir; did not tell any one else so.

Q. Did you not tell him that the vessel pitched so that it pitched the light out?

A. No, sir; nor any one else so. I took hold of an iron on the steamer; I don't know what it is called; it was not round. It was solid in her side, with a place for a rope or chain to go through. The steamer's bow struck our vessel a kind of a glancing blow.

(The witness *maks* the position of the vessels at the time of the collision, below, as follows, viz:

42



Our vessel was about one hundred and fifty-odd ton. Just after we tacked I went below to see the time-piece; probably three minutes after. There was about a six-knot breeze at the time of the collision; we did not make that, because there was a head tide.

Re-direct resumed:

The tide was running to the eastward at the time of the collision, strong; about a four-knot tide. Our light was not down being trimmed; it was not down at all from the time it was put up until it was knocked down by the steamer.

JOHN PENTICOST.

Examination of witnesses adjourned, by consent, to Monday, May 7, at 10 o'clock a. m.

43 (Endorsed:) U. S. district court. John Low, jr., vs. The Western Metropolis. Deposition of John Penticost. Benedict, Burr & Benedict, lib'ts' proctors, 76 Wall.

44

45 District Court of the United States for the southern district of New York.

JOHN LOW
vs.
THE STEAMER WESTERN METROPOLIS.

UNITED STATES OF AMERICA,
District of Massachusetts:

Be it remembered, that on the thirtieth day of May, in the year of our Lord eighteen hundred and sixty-six, at Boston, in said district of Massachusetts, before me, Henry L. Hollett, a commissioner in for the district of Massachusetts, to take affidavits and bail in civil causes depending in the courts of the United States, appointed by the circuit court of the United States for the first circuit, under the acts of Congress in such case made and provided, personally appeared Alexander McDougal and John E. Thompson, witnesses for the libellant in a certain civil suit depending in the district court of the United States for the southern district of New York, wherein John Low is libellant and the steamer Western Metropolis is respondent; and the said Mc-
46 Dougal and Thompson being by me first carefully examined and cautioned and sworn to testify the whole truth relative to the issue, did depose and say, in answer to interrogatories proposed by Robert L. Benedict, attorney for the libellant, as follows, viz:

I, Alexander McDougal, on oath, depose and say, in answer to interrogatories propounded by the libellant's proctor, in a certain suit now pending in the district court of the United States within and for the southern district of New York, entitled John Low *vs.* The Steamer Western Metropolis, as follows:

Int. 1. What is your name, age, and residence?

A. Alexander McDougal; age thirty-four; reside at Gloucester, Mass.

Int. 2. How long have you followed the water, and in what capacities?

A. Seven years; before the mast some, and mate two trips.

Int. 3. Were you mate of the schooner "Triumph" when she was lost?

Ans. Yes.

Int. 4. When did you join her?

Ans. I joined her the morning she went out of Gloucester.

47 Int. 5. Who composed her crew?

Ans. The capt., mate, three men before the mast, and steward.

Int. 6. What time that night was it your watch below?
Ans. My watch below from twelve o'clock to four.
Int. 7. When did you come on deck?
Ans. Four o'clock.
Int. 8. What called you on deck?
Ans. The capt. called me.
Int. 9. What did he say when he called you?
(Objected to.)
Ans. He told me to hurry up, 'cause there was a steamer coming.
Int. 10. Did you look at the time before you came on deck?
Ans. Yes, sir; I looked at the time just as I turned out.
Int. 11. What time was it?
Ans. Four o'clock.
Int. 12. When you came on deck what did you do?
Ans. I went forward.
Int. 13. What did you see when you got there?
Ans. I see the steamer.
Int. 14. Did you see her lights; and if so, what ones?
48 Ans. Yes, sir; I saw a red light and a white light she carries on her bows.
Int. 15th. How far off did she appear to be?
Ans. But a little ways.
Int. 16th. Were any of your crew forward; and if so, who?
Ans. Yes, sir; there were two men forward when I went forward. Pierce was one of them, and Miller.
Int. 17th. Did you see Penticost there?
Ans. I don't remember of seeing him.
Int. 18th. What did you do after you got forward?
Ans. I sung out to the capt. that the steamer would not get clear of us.
Int. 19th. What then?
Ans. I ran aft just as quick as I could; I was afraid she would kill me.
Int. 20th. Where were you when the steamer struck you?
Ans. I was aft, by the corner of the house.
Int. 21. How did she strike you?
Ans. She struck glancing on the starboard bow of the schooner.
Int. 22d. What kind of a blow was it?
49 A. It was a heavy blow; so heavy that it knocked me down on the deck.
Int. 23d. Did the schooner sink; and, if so, how soon?
Ans. She sank right away.
Int. 24th. How did you escape?
Ans. I saved myself in the main rigging.
Int. 25th. Who else?
Ans. The capt., steward, and one man before the mast.
Int. 26th. How did you get off the mast?
Ans. The steamboat's boat took me off the mast.
Int. 27th. What kind of a night was it that morning?
Ans. It was clear.
Int. 28th. How far could you see a vessel?
Ans. We could see a vessel a mile and a half or a mile and a quarter, I should think.
Int. 29th. How far could you see the steamer's small boat?
Ans. I could not tell exactly how far. I think I could see her ten minutes before she got to us.
Int. 30th. Was there a light on the schooner before the collision?

Ans. Yes, sir.

50 Int. 31. Where was it?

Ans. In the starboard forerigging.

Int. 32. Was there any change in the course of the schooner after you came on deck?

Ans. No, sir; I did not see any.

Int. 33d. Who was at the wheel?

Ans. The capt.

Int. 34th. Did you hear any conversation between the captains of the vessels after you got on board the steamer?

(Objected to.)

Ans. Yes, sir.

Int. 35th. What was it?

Ans. The captain of the steamer said he did not think it was any of our fault, although he was not himself on deck. He said if it was a good many capt's in his place they would have let us drown to avoid a lawsuit.

Int. 36th. When you went forward, whereaway did you see the steamer's lights?

Ans. I see them on the starboard bow.

51 And in answer to cross-interrogatories, propounded by J. C. Dodge, Esq., att'y for the respondents:

Int. 1. What vessels have you been mate of?

Ans. Of the sch'r "Flying Fish."

Int. 2. Who owned her?

Ans. John Low, jr.

Int. 3. How long was you in her as mate?

Ans. A month.

Int. 4th. When was that?

Ans. Last fall.

Int. 5. Was she a fisherman?

Ans. She was coasting then.

Int. 6. What was the voyage you made in her as mate?

Ans. Carried a load of mackeral to New York.

Int. 7th. How large is she?

Ans. Something over a hundred tons.

Int. 8. This was all you went as mate until you joined the Triumph?

Ans. I went in the Triumph first.

Int. 9. Then you went first as mate in the Triumph?

Ans. Yes, sir.

Int. 10th. Then this was your first voyage in the Triumph?

52 Ans. Yes, sir, in the Triumph.

Int. 11th. When you came on deck you went right forward, and then immediately sung out to the captain and ran aft, did you not?

Ans. Yes, sir.

Int. 12th. Then you run all the way until you got to the corner of the house?

Ans. Yes, sir. I went pretty smart.

Int. 13th. How many points over your starboard bow did you see the steamer when you were forward?

Ans. I could not say. She could not be many points; she was close to us.

Int. 14th. Give me your best judgment as to the number of points?

Ans. She may be a point and a half or two points.

Int. 15th. Did you look at any thing after you came on deck before the collision but the steamer?

Ans. No, sir. I looked at the steamer's lights and the steamer herself.

Int. 16th. When did you first notice the weather after you
53 came on deck?

Ans. When I was in the rigging.

Int. 17th. You had been below all the time from twelve to four o'clock, had you not?

Ans. Yes, sir. I was below from twelve to four.

Int. 18th. And asleep?

Ans. I was.

Int. 19th. What kind of a light was that you say the sch'r had in her rigging?

Ans. A lantern; white light.

Int. 20. When did you last see it?

Ans. Just as I went forward when I first came on deck.

Int. 21. Are you now sure of that?

Ans. Yes, sir.

Int. 22. Did you not say that you looked at nothing but the steamer and her lights?

Ans. I suppose a man could see what was on deck and in the rigging.

Int. 23d. Do you mean to swear that you *know* remember that you saw that light when you came up?

Ans. Yes, sir.

Int. 24th. Had the sch'r any other lig*th*s set in her rigging
54 or on her deck?

Ans. She had none other in her rigging; there was a lantern on the galley.

Int. 25th. Had she any boxes for the red and green lights?

Ans. No, sir.

Int. 26th. When did this collision happen?

Ans. In February. It was in March—St. Patrick's day in the morning.

Int. 27. Did you not first say it was in February, and then before you said in March, and St. Patrick's day. Did not the man who sits next you tell you when it was?

Ans. He said something. I don't know as I understood what he said.

Int. 28th. Who is the man who spoke to you?

Ans. Mr. John Low, jr.

Int. 29th. Was he the owner of the sch'r "Triumph?"

Ans. Yes, sir.

Int. 30th. After you got on the deck of the steamer did you not hear your capt. tell the master of the steamer that the sch'r had no
55 lights set, or words to that effect?

A. No, sir.

Int. 31st. Did you hear that said to any one?

Ans. No, sir.

Int. 32d. Did you hear anything said about your light?

Ans. No, sir.

Int. 33. What was the sch'r loaded with?

Ans. Codfish & macker'l.

Int. 34. Did she sink entirely out of sight?

Ans. All out of sight but part of *he* masts.

Int. 35. How much of her masts remained out of water?

Ans. Probably there was eight feet.
Int. 36. Why did she not sink further?
Ans. The bottom would not let her go down.
Int. 37. How long after the collision before she sunk?
Ans. Immediately; so fast that I was in the water while going up the rigging.
Int. 38. You stood on the eight feet of mast left out of water.
Ans. Yes, sir.
Int. 39. Did you see any vessel but your sch. and the steamer
56 after you came up and before you were taken off?
Ans. No, sir; only the light-ship.
Int. 40. Was this near the light-ship?
Ans. Yes, sir.

ALEX. McDOUGAL.

57 (This deposition is taken with the reservation that it is not to used, except with the consent of the proctors for the respondents.)

I, JOHN E. THOMPSON, on oath, depose and say, in answer to interrogatories propounded by the libellants' proctor, in a certain suit now pending in the district court of the United States within and for the southern district of New York, entitled John Low *vs.* The Steamer "Western Metropolis," as follows:

Int. 1. What is your occupation?
Ans. Coasting fishing—mariner.
Int. 2. How long have you followed the water?
Ans. About twenty years.
Int. 3. How long have you been master?
Ans. About twelve years.
Int. 4. Where were you on the morning of March 17th, 1864?
Ans. I was master of the sch'r "Flying Fish," in the vicinity of the highlands of Cape Cod.
Int. 5. How far is that from the Cross Rip light-boat?
58 Ans. Sixty miles; I think about that.
Int. 6th. How do you identify the night?
Ans. I was called out about that time. I have bills of lading that I signed the afternoon of the sixteenth of March.
Int. 7th. Where were you on the sixteenth day of March?
Ans. I was in Gloucester.
Int. 8th. What time did you leave there?
Ans. At ten o'clock at night of the sixteenth, bound for New York.
Int. 9th. What part of the night were you on deck?
Ans. I was on deck from ten to twelve, and was called out at four.
Int. 10th. How was the night at four o'clock?
Ans. It was cloudy.
Int. 11th. Were any stars to be seen?
Ans. Yes, sir.
(12th int. omitted. Clerical error.)
Int. 13th. How far could you see a vessel without a light?
Ans. A mile, I should think.
Int. 14th. Did you meet the "Western Metropolis" that morning; & if so, where?
59 Ans. We did; right off Chatham lights.
Int. 15th. Did you see the wreck of the Triumph near the Cross Rip light when you arrived there?

Ans. I saw a vessel. I did not know it was the Triumph.
Int. 16th. When did you learn it was the Triumph?
Ans. Not until after I arrived in New York.

And in answer to cross-interrogatories propounded by John C. Dodge, esq., att'y for the respondents:

Int. 1. Who owned the Flying Fish?
Ans. John Low, jr.
Int. 2. Are you still in her?
Ans. I am; yes, sir.
Int. 3. What voyages did you make in her in the spring and summer of 1864?
Ans. I went a couple of trips in her to New York. Then I went a mackeral fishing to the Bay of Chaleur.
Int. 4. Was this the first trip in her?
Ans. I believe it was.
Int. 5. Where was she on the fifth of April that year?
60 Ans. I rather think she was on her way home.
Int. 6th. Where was she on the fifth, tenth, fourteenth, and seventeenth of April?
Ans. I can't tell exactly whether we were in Gloucester or on our way home. We were some three weeks getting home.
Int. 7th. What time did you go on deck on the morning of the 5th of April, 1864?
Ans. I can't tell.
Int. 8th. Do you know what the weather was on the morning of the 5th of April, or on the mornings of the 6th, 7th, 8th, 9th, 11th, or 13th of April, 1864?
Ans. No, sir; I couldn't tell you.
Int. 9th. Were there stars visible, or was it cloudy on the morning of the 1st of April, 1864, at four o'clock?
Ans. That is something that I could not tell you.
Int. 10th. How do you know that the steamer that you met was the Western Metropolis?
Ans. I did not know till I arrived in New York. The crew that
61 were taken off said that we passed them or they passed us *of* Chatham.
Int. 11. You know that, then, only from what the crew told you?
Ans. That is all.

Direct resumed:

Int. 1. Do you recollect meetin' a steamer that morning near Chatham?
Ans. Oh, yes.
Int. 2. But that *is* was the "Western Metropolis" you only know by being told?
Ans. That is all.

JOHN E. THOMPSON.

62 (Here follows the usual certificate, dated the 31st May, 1866, and signed by Henry L. Hallett, comm'r circuit court of U. S., Mass. dist.)

(Endorsed:) 18361. U. S. district court. John Low, jr., *vs.* The St. Western Metropolis, &c. Deposition of Alex. McDougal & John E. Thompson, on part of lib'l't, taken before Henry L. Hallett, U. S. comm'r, Mass. dist. Filed June 4th, 1866. Ent'd order.

63 U. S. district court.

JOHN LOW, JR.
vs.
THE STEAMER "WESTERN METROPOLIS."

We hereby consent that the deposition of Elisha O. Crowell and Emerson Colby may be taken, at the office of Benedict, Burr & Benedict, No. 76 Wall street, in the city of New York, on the 23d day of October, A. D. 1866, at 3 o'clock p. m., and that said deposition, when sworn to before a notary public, and without being filed, may be read upon the trial of this cause on the part of the libellant, subject to all legal objections, except as to the mode of taking.

BEEBE, DEAN & DONOHUE, *for Cl'ts.*

Dated New York, Oct. 23, 1866.

U. S., southern district N. York.

JOHN LOW, JR.
vs.
THE STEAMER "WESTERN METROPOLIS."

64 SOUTHERN DISTRICT OF NEW YORK, *ss:*

Elisha O. Crowell, of Gloucester, Mass., being sworn, says he is a book-binder; knows the schooner Triumph, and recollects when she was lost. I saw her about ten o'clock in the forenoon of the day she was said to be lost. She was then in Gloucester; she left about that time for New York. The night of that day I was at sea on board a vessel, the schooner Ada Herbert, bound to New York. I was captain of her. At four o'clock in the morning—that is, the next morning—we were about half way from Chatham lights to Pollock Rip light-ship, and I was on deck. One or two clouds rising on the northwest, but it was a clear, starlight night. There was a moon until three o'clock in the morning.

Q. At four o'clock how far could you see a vessel?

A. A mile and a half. I was on deck from twelve to four. It was clear & pleasant; not a cloud to be seen from 12 to 3, when the
65 moon set. I went below a few minutes past four. It was cold that night.

Q. Was it very cold?

A. Yes, sir; pretty cold.

Q. Did you pass anywhere near where the schooner was said to be sunk?

A. Yes, sir; within a half or three-quarters of a mile of her at about ten o'clock in the forenoon of that day.

Q. Did you see anything of her?

A. As I was passing I saw a vessel sunk; did not know what vessel it was. I was steering a west course. As I was steering past the light-ship, a west course to the northward of the light, the wreck was lying all of east by south of the light-ship—the Cross Rip light-ship. The light-boat was nearer to me than the wreck was. When I say all of east by south, I mean east by south, or east-southeast from the light-ship. [I remarked to my man at the time, that I could not see how the vessel could be sunk inside of the light-ship—inside of the course-way.]

(Obj. to.)

She was to the southward of the channel. I saw, I think, fif-

66 teen to twenty feet of her masts; saw some of the mainsail and part of the jib sticking out of the water. Did not see the foresail. At four o'clock in the morning the wind was west-northwest to N. west.

Being cross-examined:

Up to the time I saw that wreck I had not heard of the damage to the schooner. I left Gloucester the 16th day of March, 1864. I kept it in my head. I made no other minute of it, except in a book. My book I left at home. I have no memorandum here of it. I left at four o'clock in the afternoon. The wind when I left was W. N. W. to N. W., and continued so until after four o'clock of the 17th, when I turned in; can't say what it was until I came on deck. When I came on deck at 8 a. m. of the 17th then it was varying from N. W. to N. W. by N. When I said four o'c. we don't generally get turned in until fifteen minutes after; sometimes ½ an hour. Our watches we change at regular hours, 8, 12, & 4; that is the time we relieve each other, but don't get below
67 until the 15 or 30 minutes after. The wind continued as it was when I came on deck, only it hauled a point more to the north, between when I came on deck and twelve o'clock. I paid particular attention to the wreck as I passed it, but I did not know what vessel it was at the time, and I am certain about its position and condition.

ELISHA O. CROWELL.

Sworn to before me this 23d day of Oct. 1866.

[SEAL.] WM. D. JONES,
Notary Public, N. Y. Co.

S. dist. of New York.

JOHN LOW, Jr.
vs.
THE STEAMBOAT "WESTERN METROPOLIS," &C.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Emerson Colby, of Rockport, Mass., being sworn, says, that he is a seafaring man; know the schooner "Triumph;" saw her in Glou-
68 cester. I was mate of the schooner Ada Herbert, which left Gloucester at four o'clock p. m., on the 16th day of March, 1864. The Triumph left about eleven in the morning, same day, both bound to New York. I saw the Triumph leave. I turned in at 8 in the evening. It was clear. I came out again at four o'clock in the morning. I got on deck at four, or perhaps ten minutes after four; the weather was then clear; no moon; stars were out; very few, if any, clouds.

Q. How far could you see a vessel?

A. I should think a mile or more. It was quite cold weather. Wind was about N.-west at that time. I have been to sea about twenty-five years; most of that time familiar with that locality; running back and forward over these shoals; crossed them that year twenty-six times.

Cross-ex'd:

I did not see the wreck; it was my watch below at time of pas-
69 sing. I am not now attached to any vessel. It is about four months since I have been attached to any. Her name was—I don't recollect. I have since left; been in manufacturing business. I can now tell her name—schooner Shepherdess, of Rockport. When I came on deck at four, our vessel was heading to the southward. That

was laying our course where I then was. From the time I came on deck at four up to 8 the wind continued the same until I went below again. I remained below from 8 to 12 of the next day. Our course at 8 when I went below was west by S. We were heading it. That would be our course until we got to the westward of Cross Rip light-ship. When I came on deck, at 4, and from that time until 8, when I went below, we were running about five or six knots.

Further direct:

It was the capt's watch on deck from 12 to 4 in the morning, 17th, and I was below during that time. I turned out at four o'clock in the morning.

70 When did you turn in?
At 8 o'clock the next morning after leaving Gloucester.
Whose watch was it on deck then?
I don't know as we had watches till night.
When was your first watch on deck?
Eight o'clock in the evening, first night out.
And when did you turn in?
At twelve o'clock.
What was the weather at twelve o'clock in the night?
It was clear, and it was clear all the time during my watch.

EMERSON COLBY.

Sworn to before me this 23d day of Oct. 1866.
[SEAL.] JNO. T. McGOWAN,
Notary Public, New York.

71 (Endorsed:) U. S. district court. John Low, jr. vs. The S. S. "Western Metropolis." Dep'n's of wit. for lib'ts. Benedict, Burr & Benedict, proctors lib'ts, 76 Wall, N. Y. (Crowell & Colby.)

(Here insert diagram, page 72.)

73 U. S. district court.

JOHN LOW, JR., *vs.* THE STEAMSHIP WESTERN METROPOLIS. } April 21, 1868.

Mr. Benedict for libellant.

Deposition of John Penticost, seaman on Triump.
Do " Alexander McDougal, mate of do.
Do " John E. Thompson.
Do " Elisha O. Crowell.
Do " Emerson Colby.

EBEN D. CAMPBELL, sworn:

I follow sea; done so 30 years; was capt. of Triumph; loaded with cod-fish and mackeral; full, not very deep; wind at time of collision N. W. by W.; was beating before collision; wind headed us off 1 point 1 hour before collision; at collision were on starboard tack; had tacked about ten minutes before; on previons tack had headed about N.; lookout reported steamer's lights to westward; her lights bore
74 west ½ S.; I saw two white lights, high and low; I kept the T. along by wind same way; I could see by steamer's lights she was

coming down nearly for us—high light and low light in range; she was going E. S. E. course by her lights; I was at wheel at collision; mate below when lights 1st reported; I called mate at 4 o'c. to change watch; called all hands then forward and aft; I apprehended no danger till I spoke to mate 2d time, when steamer got to light-boat; I then saw the steamer swinging to her starboard; she kept swing. till we came together; I first saw her colored lights when she was abreast of the Cross Rip light; I then saw her green light till she got further along; then, as she kept swinging, I saw red light; then both at once; then green disappeared, and saw red till collision. I had bright white light in fore rigging till collision; it was kept burning. When I spoke to mate 2d time, he was coming up; it was when she was opening
75 red light; I told him to hurry forward; she was then only three or four times her length off; she was ½ way from Cross Rip boat down, when mate went forward; he said she was swinging and trying to cross our bow, mate ran aft. I kept hold of wheel; never changed it a spoke either way. They hollooed forward on our vessel to the W. M.; she hit us on starboard bow, just forward of fore rigging.

(Diagram shown, No. 1.) This is about correct.

I heard not a word of hail from steamer; she was coming pretty fast; I could do nothing to get out of her way after she ported her helm. It was a clear starlight night after moon went down; could see sails a mile and ½; sent boat from steamer and picked us up from rigging and mainmast head; vessel on bottom and heeling over; the Cross Rip light bore W. N. W., just before steamer struck us. I remember when small boat came to pick us up; saw it 8 or 10 minutes before it reached
76 us; could see it pulling towards us; there were five in boat, 4 oars and 1 at helm. I never saw wreck afterwards. I left the Ada Hulbert in Gloucester, ready for start; I left 8 a. m., morning of 16th; I saw her on Nantucket Shoals from W. M.; she was beating up over shoals; can't tell time. I had but very little talk with capt. of W. M., on board of her; it was in saloon by furnace; it was very cold that night; it froze; it made some ice that night.

X'd.

I saw these 2 men that night; I did not say in their presence I had no light up. I can't say where I saw the A. H. that trip; went within a mile and a ½ of her; can't tell time of day; it was before dinner; when mate went forward, he said she was swinging off
77 towards us; mate has been Ex'd.; he said she was swinging off, trying to cross our bow; can't say whether he said she would not clear us; he might have said the whole; I recollect his saying the other. I had 6 of us, crew all told; 1 was cook; he did not keep watch. Penticost & Miller was in my watch; Miller was drowned; mate and 1 seaman were mate's watch. After I saw steamer's lights, I called mate; Penticost reported light; he had not gone to the cabin that I remember; don't think I would remember. P. said steamer's light coming down; he might have said ahead; he reported a steamer's light; that is all I remember. I can't give idea how far off steamer was. I asked P. whereaway, and he pointed westerly, and I saw her lights. Probably she was 2½ miles off then. I was going 6 knots. When I first saw her she bore from our bow about 3 or 4 points off our starboard bow, perhaps more; she bore W. by S.
78 I saw then her high light and low light; then I saw her green light; then, just before came together, saw her red light. She was swinging; this was just before collision; we made red light before

mate ran forward; just a moment before; collision was very short time after. From other side of Cross Rip light, with wind aft, to C. R. light, course would be W. by S., when got to C. R. light, would change to W. N. W. When I 1st saw steamer, or her light, I supposed she would go to N. of us. I am in no vessel now; have not been to sea since summer of 1866.

JOHN LOW, Jr., sworn:

Live in Gloucester; lived there at collision. I was in G. when the T. sailed; she sailed 8 or 9 a. m. I saw the A. H. there that day; she left in p. m.; don't know where the cook of the T. is. I tried to have the T. raised, but could not find her.

79 *Evidence for claimants.*

WILLIAM A. LIGHTHALL sworn:

Engineer; been to sea; off & on river & sea navigation 35 years. I was on W. M. at collision. I was in my bunk. My attention called 1st by bells; I heard bells strike quick; awoke; turned out. When I turned out it was foggy; looked out of window while I was dressing, and saw it was foggy; after I got on deck I looked out and could not see anything; it was a little foggy. When our boat was lowering I was looking out; boat right opposite my bunk while I was dressing; before I got dressed I heard collision; boat lowered after collision. I looked after boat when she was coming back, and heard oars before I saw her; they were under stern and made around. I talked with capt.; he said he had no light up.

X'd:

I stopped going to sea 10 years ago. Have been inspector of steamboats & boilers for port of N. Y.; was bred to steam-engine
80 building; learned trade at Allaire Works; followed steamboating on Hudson R. 16 years. I was passenger on W. M. Capt. said to me they had no light up. I asked him if he had a light, and he said no; they went down to get a light when they saw the vessel. I never saw him since till to-day. I had a long conversation with him, and felt very sorry for him. It was very cold that night; I remember that. My berth was on starboard side, I think; won't be positive; it was aft; it was in saloon; saloon above main deck.

MARCUS L. WOODHULL sworn:

Engineer for 18 or 19 years; been going to sea. I was 1st ass't engineer of W. M. at collision. I was on duty at engine; prior to time bells rung the W. M. was making between 7 and 8 knots; running slow;
81 I have seen her make 16 knots; she ran slow by orders. When I turned out at 12 o'clock was moon, but atmosphere heavy; at collision was heavy; could not see any distance; saw no lights; heard 2 bells to stop, and 2 to back; did as soon as steam could do it. Steam goes down when watch changes; this was so at 4 o'c. I obeyed bells promptly. I felt jar of collision; engine had made 2 or 3 revolutions back when struck.

X'd:

Engine-room near amidships, even with main deck; same level; 1 door on each side engine-room; doors to gangway. Engine is midships, fore & aft, and larboard and starboard.

At 12 o'c. moon; floating clouds; atmosphere heavy; moon pretty well to W. at 12 o'c. Moon went down just before collision; I *I* had room doors open; no windows in engine-room.

Hatches were off at this time; could not see stars. Hatches open all the way from N. Y., and doors open, as far as I know. I did not go out of engine-room till boat lowered and engine stopped; till after
82 collision; then I did. I staid out 1 or 2 minutes; I did not see small boat start; can't say how long after collision she got back; no outlet forward from engine-room; I did not see small boat at all.

FRANKLIN CLARK sworn:

Bro't up merchant; not in any business now; was on W. M. as passenger at collision; don't think I recollect seeing capt.; don't recognize him; I heard conversation between capt. of T. and others; don't recollect what, or anything about light; night was thick and heavy; I was in berth; heard concussion; came out.

WILLIAM T. TAYLOR sworn:

Was on W. M.; was in berth before collision; was ship's storekeeper; it was dark and thick that night; could see a vessel only a short distance off; the small boat had gone away before I came out; she was close before I saw her; could hear dip of oars before I saw her.
83 I heard some talk about light in cabin; they said they had no light.

X'd:

I can't say which one said so. I am 19 now.
Can't remember when W. M. left New York; she is side-wheel.

Deposition of Elisha H. Daggett read.
Do. William B. Hilton "

LEMUEL BROWN sworn:

Was 1 of owners of W. M.; the owners parted with her 2 years ago. None of the witnesses for claimants have been in my employ since; I have tried to find the lookouts—can't find them.

For libellant:

EBEN S. CAMPBELL recalled:

I did not say we had no lights, or that owner refused to buy lights, and I could go without them. (Owner never told me so. Ruled out.) Been on T. since Feb. 3 that year; from N. Y. to place of collision is 180 miles; if W. M. had kept on without porting she would have gone ½ mile to N. W. Tide was 2½ to 3 knots.

84 APRIL 23D, 1868.

THOMAS WOOD sworn:

Seafaring; was on W. M.; I was on lookout at collision—on forecastle; there was another man with me on lookout; I was performing no other duty; I was on starboard side; other man on port side; can't say what his name was; steamer was going 7 or 8 knots, by land, at collision; night was rather foggy, and quite a vapor rising from the water. I saw the vessel ahead; she had no light that I could see. Our steamer was blowing her fog-whistle; the fog was so thick she kept blowing her fog-whistle; *the fog was so thick she kept blowing her fog-whistle.*

X'd:

I belong in Brooklyn; arrived here last, 3 weeks ago, from wrecking on Jersey Beach; have been in New York last 3 weeks; not got family; I board 60 Wash'n st., Brooklyn; never boar'd there before; been to sea 12 years; able seaman; been on sailing vessels; I reported the vessel; I said, "Sail, ho! right ahead!" It was not moonlight in my watch; I had been on watch 1½ hours; my look-out watch was changed at 2 o'c.; my watch on deck was 12 to 4; no moonlight during that watch; the other man did not report the vessel at all, he merely spoke to me; I did not know what sort of vessel she was, it was too thick. This was about ½ before 4; I was told so; not yesterday; have talked with nobody; they found me in Smith st.; the shipping master, Clark, found me and said Brown wanted to see me; I went to see Brown; Brown told me he wanted me to come here; I went away and came here this a. m.; B. merely asked if I was in steamer when collision happened; he told me he had been looking for me; he said not a word about the case. This collision was in March, about 15th or 16th, somewhere around. I did not see schooner change her course; I saw her sails first; it was a very short time from the time I reported her till they came together. I say 7 or 8 knots by distance we had come; we had been coming 12 hours, less 15 minutes; left N. Y. 4 p. m.

Re-direct:

Saw light-ship, just before collision, going slow with engine; current with us; engine slow by what I heard—general report; just before we struck I saw her boom was on port side; I heard them hallo; didn't see anybody on her; stood on forecastle till struck; we struck her on starboard bow; not exactly square head on.

Mr. R. D. Benedict argues for libellant.
Mr. Beebe for claimants.
Mr. Donohue for claimants.
Mr. E. C. Benedict for libellant.

C. A. V.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK,
City, County, and State of New York, ss:

Be it remembered, that on this sixth day of April, in the year of our Lord one thousand eight hundred and sixty-eight, I, John A. Osborn, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did call, and cause to be and personally appear before me, at my office, at the United States court building, 39 and 41 Chambers street, in the city of New York, in the said southern district of New York, in the State aforesaid, Elisha H. Daggett, to testify and the truth to say, on the part and behalf of the claimants, in a certain suit or matter of controversy now depending and

undetermined in the district court of the United States for the southern district of New York, at New York in the district aforesaid, wherein John Low, jr., is libellant, ags't the steamer "Western Metropolis," her tackle, &c., respondents.

And the said Elisha H. Daggett being about the age of thirty-nine years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said Elisha H. Daggett, and he did thereupon depose, testify, and say as follows, viz:

I am a seafaring man; I was on board the "Western Metropolis" at the time of the collision, in the capacity of pilot; I was in the pilot-house at the time of the collision; I had been there off and on ever since I left New York, for 18 hours; at this particular time I had been there since dark; Adams, the quartermaster, was with me in the pilot-house. At the time of the collision it was dark and hazy; there had been a moon, but it had set at the time of the collision. About 20 min-
88 utes to 4 o'clock the lookout on forecastle reported sail right ahead; I then told the man to port his wheel and ring two bells to stop the ship; I rang two more bells to go back—to back the ship; I gave the order to port the wheel and rung the bells as quick as it could be done. I saw the vessel one and a half or two minutes before we struck her; she was not more than ¼ or ½ mile off at the time I first saw her. It was dark. I could not tell. I was looking in that direction when the lookout made the report. I had night glasses in my hand; I saw no light on that vessel; I had a full view of her as soon as I got my glass on her. I heard no conversation between the schooner's people and the people of our vessel.

X'd by Mr. Benedict:

I belong to the city of New York. My business is seafaring man. I was hired for that passage as pilot; I mean by pilot a man who
89 knows the way, won't run ship ashore, and has charge of the ship in general. I was acting at that time as coast pilot for passages; had no license at that time. I had never been employed permanently on a steamer as pilot. I had been so employed as first officer, that is permanently, on steamers. I have been on southern boats, and on the "Chesapeak" to Portland, Maine; on the latter two months. The southern steamers and the "Chesapeak" were the steamers I had been on. This collision was about 20 minutes before 4 a. m., in March, 1864—the 17th of March. A vessel coming as she was without light, you could not see her farther than ¼ to ½ mile. So soon as I heard the report of the lookout I rung the bell and put the glass to my eye. I saw her by the naked eye before I put the glass up. There was some few stars. It was very hazy around the water.

ELISHA H. DAGGETT.

Subscribed & sworn to before me this 6th day of April, A. D. 1868.
JOHN A. OSBORN,
U. S. Com'r.

91 UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK,
City, County, and State of New York, ss:

Be it remembered that on this sixth day of April, in the year of our Lord one thousand eight hundred and sixty-eight, I, John A. Osborn, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and

by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did call, and cause to be and personally appear before me, at my office, at the United States court building, 39 and 41 Chambers street, in the city of New York, in the said southern district of New York, in the State aforesaid, William B. Hilton, to testify and the truth to say, on the part and behalf of the claimants in a certain suit or matter of controversy now depending and undetermined in the district court of the United States for the southern district of New York, at New York, in the district aforesaid, wherein John Low, jr., libellant, ag'st The Steamer "Western Metropolis," her tackle, &c., respondent.

And the said William B. Hilton, being about the age of forty-two years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said William B. Hilton, and he did thereupon depose, testify, and say as follows, viz:

I am a seafaring man; I am shipmaster; have been so for 20 years; I was on board "Western Metropolis," at the time of collision, as master; I left the "Western Metropolis" when she was sold to the North American Lloyd; I am now in the steamship "Havana;" I was in the pilot-house, in my berth, at the time of the collision; I was awake; the steamer was running about 7 or 8 miles prior to the report of the look-out; her highest rate of speed was from 14 to 15 miles per hour.

92 The tide or current at the place of collision was with the ship; the speed which I gave is with the tide. At the time of the collision the night was dark and hazy; there was no moon at the time of collision; I judge the moon had set about ¼ past two that morning; the collision occurred 20 minutes before 4 a. m.; the first thing that I heard was the report, "Sail on the port bow;" the pilot gave orders to port the helm instantly; then 4 bells to stop and back; the order to port and the ringing of the bells was done as quick as could be without confusion; I jumped to the wheel; it was then hard a port; the collision taking place about the time the last bell was struck; I could see that night a fair light from ¼ to ½ mile.

Xd by Mr. Benedict:

I saw the collision take place.

Redirect:

93 I had conversation with captain of the schooner after he came on board; I asked him why he hadn't a light; his reply was the owner refused to buy lights; that he could go without them, and did not require them. A vessel that morning at 20 minutes to 4 o'clock; I could not see half our ship's length off; our steamer was about 300 feet; I expect to go to sea as soon as ordered.

WM. B. HILTON.

Subscribed & sworn to before me this 6th day of April, A. D. 1868.

JOHN A. OSBORN,
U. S. Comm'r.

94

95 UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK,
City, County, and State of New York, ss:

Be it remembered that on this tenth day of April, in the year of our Lord one thousand eight hundred and sixty-eight, I, John A. Osborn, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did call, and cause to be and personally appear before me, at my office, at the United States court building, 39 and 41 Chambers street, in the city of New York, in the said southern district of New York, in the State aforesaid, Charles W. Adams, to testify and the truth to say, on the part and behalf of the claimants in a certain suit or matter of controversy now depending and undetermined in the court of the United States for the southern district of New York, at New York, in the district aforesaid, wherein John Low, jr., is libellant, ag'st the steamer Western Metropolis, her tackle, &c., respondent.

And the said Charles W. Adams, being about the age of thirty-one years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said Charles W. Adams, and he did thereupon depose, testify, and say as follows, viz:

I follow the sea; I am attached to the steamship "Circassian," at present. I was on board the "Western Metropolis" in March, 1864. I was on the bridge prior to the report of the look-out as to the "Triumph." I was keeping a look-out; this was just forward of the pilot-house—about 3 feet forward. I first heard the man on the forecastle sing out "a sail;" I don't know that man's name; at the time our vessel had been going 6 or 7 knots. The night was dark and cloudy at the time of the
96 collision; I could see a good light about a mile & half off; when the man on the forecastle reporte "a sail," our wheel was ported; 4 bells rung—two to stop and two to back; when he reported the "sail" the schooner was once our ship's length off; she was right under our bow. Prior to the report of "a sail," I had been looking ahead; if there had been a light on that vessel, I think I should have seen it. There was nothing on board our vessel, or anything between me and the schooner to prevent me seeing the light had there been one. I saw the people who came from the schooner. There were two men on the forecastle—one on each side, keeping a look-out.

Xd by Mr. Benedict:

I belong in Rockland, Maine; I was born there; I had been on "Western Metropolis" about 18 months at that time; I was chief officer; I was the officer of the deck, and came on at 12 o'clock at night;
97 I have been chief officer all the time—18 months.

Redirect:

The collision took place from 20 to 25 minutes to 4 o'clock in the morning.

Recross:

I can't tell the names of either of the men on the forecastle on the look-out.

CHARLES W. ADAMS.

Subscribed & sworn to before me this 10th day of April, A. D. 1868.

JOHN A. OSBORN,
U. S. Comm'r.

98

99 UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK,
City, County, and State of New York, ss:

Be it remembered that on this tenth day of April, in the year of our Lord one thousand eight hundred and sixty , I, John A. Osborn, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24, 1789, did call, and cause to be and personally appear before me, at my office, at the United States court building, 39 and 41 Chambers street, in the city of New York, in the said southern district of New York, in the State aforesaid, Samuel Adams, to testify and the truth to say, on the part and behalf of the claimants in a certain suit or matter of controversy now depending and undetermined in the district court of the United States for the southern district of New York, at New York, in the district aforesaid, wherein John Low, jr., ag'st the steamer "Western Metropolis," her tackle, &c.

And the said Samuel Adams, being about the age of twenty-four years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said , and he did thereupon depose, testify, and say as follows, viz:

I am a brother of the last witness. I follow the sea for a living. Have followed the sea 16 years. I was quartermaster on the "Western Metropolis." I was at ship's wheel at time of collision; had been so since twelve o'clock. It occured out 20 minutes before 4 a. m. My brother Charles was on the bridge. Two of the sailors were on the forecastle; I don't recollect either of their names; they were keeping look-out there. The night was dark, thick, & hazey at the time of collision; we could see a good light about a mile off. The first thing I
100 heard or saw was a lookout on the forecastle cried out, "a sail ahead." The pilot told me to port, rung 4 bells to stop & back. That was done as quick as it could be done. At the time the vessel was reported our vessel was going about 8 knots; her full speed was about 12 knots per hour. I was looking ahead when I heard that report of "sail ahead."

Q. Was there anything on your vessel ahead to prevent you seeing a light if there had been one on the schooner?

A. No, sir.

Q. Was there any light on the schooner?

A. No, sir; I didn't see any. I saw the folks from the schooner when they came on board.

Q. Was anything said by them, or either of them, about a light on their schooner? (Obj. to.)

A. I heard one of them say they had no light on board; I don't know which one of them said so.

Xd. by Mr. Benedict:

I belong to Rockland, Maine. I had been of the steamer about
101 15 days when the collision occured. I have been to sea about 16 years; I think we were going through the water 7 or 8 knots per hour. I did not see the sail until after we struck her. The pilot was in the wheel-house with me; Mr. Daggett was the pilot. I quit the wheel at 4 o'clock. I did not go in the boat to pick the men up; some of the ship's men did; I don't know who.

Redirect:

The little boat did not get back till daylight; we did not see her after she left us.

SAMUEL ADAMS.

Subscribed & sworn to before me this 11th day of April, 1868.
JOHN A. OSBORN,
U. S. Comm'r.

(Here follows the commissioner's certificate.)

Filed April 13th, 1868.

102

103 At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court rooms, in the city of New York, on Monday the fourth day of May, in the year of our Lord one thousand eight hundred and sixty-eight:

Present, The honorable Samuel Blatchford, district judge.

JOHN LOW, JR.,
vs.
THE STEAMER "WESTERN METROPOLIS," HER tackle, &c. } 18,361.

This case having been heard on the pleadings and proofs and argued and submitted on briefs and points by the advocates for the respective parties, and due deliberation being had in the premises, it is now ordered, adjudged, and decreed, by the court, that the libellant recover in this action against the steamer "Western Metropolis," her tackle, &c., the damages by him sustained by reason of the collision in the pleadings mentioned, and that it be referred to a commissioner of this court to ascertain and compute the amount of such damages, and to report therein to this court with all convenient speed.

SAM'L BLATCHFORD.

104 (Indorsed:) Vol. 18, No. 361, United States district court, for the southern district of New York. John Low, jr., vs. The Steamer "Western Metropolis." Benedict & Benedict, proctors for lib'ts. Int'y decree, & order. Filed the 4th day of May, 18 8.

105 District court of the United States for the southern district of New York.

JOHN LOW, JR., LIBELLANT,
vs.
THE STEAMER "WESTERN METROPOLIS," HER tackle, &c., respondent.
} Commissioner's report.

In pursuance of a decretal order made in the above entitled cause, on the fourth day of May, in the year of our Lord one thousand eight hundred and sixty-eight, by which, among other things, it was referred to the undersigned, one of the commissioners of this court, to ascertain and compute the amount due the libellant for damages by him sustained by reason of the collision in the pleadings mentioned, and to report thereon to this court with all convenient speed—

I, John A. Osborn, the commissioner, to whom the matter was referred, do report that I have been attended by the proctor for the libellant and proctor for claimant, and have taken and examined the testimony offered in support of the libellant's claim for damages aforesaid, and do find that there is due to the libellant for such damages following:

Value of schooner Triumph	$10,000 00
" " mackeral fish	7,283 00
" " codfish	4,901 00
Cost of inspection	74 00
	$22,258 00
With in't on the amount of loss from M'ch 17, 1864, to May 26, 1868—4 y'rs, 2 mo's, 9 d'ys—am't as to in't	5,599 98
	$27,857 98

Making in all the sum of twenty-seven thousand eight hundred & fifty-seven dollars & $\frac{98}{100}$ doll's.

Dated the 26th day of May, A. D. 1868.

All which is respectfully submitted.

JOHN A. OSBORN,
U. S. Commissioner.

BENEDICT & BENEDICT,
Proctors for libellant.

106 (Indorsed:) Vol. 18, No. 361, United States district court for the southern district of New York. John Low, jr., *vs.* The Steamer "Western Metropolis." Benedict, Bum & Benedict, proctor for libel't. Commissioner's report, ent'd order conf'm 4 days. Filed the 26 day of May, 1868.

107 At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court rooms, in the city of New York, on Thursday the fourth day of June, in the year of our Lord one thousand eight hundred and sixty-eight.

Present, the honorable Samuel Blatchford, district judge.

JOHN LOW, JR.,
vs.
THE STEAMER "WESTERN METROPOLIS," HER tackle, &c.
} 18,361.

The time to file exceptions to the commissioner's report herein having

expired and no exceptions having been filed, on reading the report on file of John A. Osborn, United States commissioner, to whom the above matter was referred, by which there is reported due the libellant for damages by collision on pleadings mentioned, with interest, &c., &c., the sum of twenty-seven thousand nine hundred & five $\frac{25}{100}$ dollars.

On motion of Benedict & Benedict, proctors for the libellant, it is ordered that the report be in all things confirmed, and that the libellant recover in this action against the steamer Western Metropolis, her tackle, &c., the amount reported due, together with his costs to be taxed, which costs have been taxed at the sum of two hundred & ninety-two dollars $\frac{73}{100}$, and that the said steamer, her tackle, &c., be condemned therefor.

And on like motion it is further ordered that out of the proceeds of the stipulation of the claimants for costs & value when paid into the registry of the court, the clerk of this court pay to the libellant or his proctors the amount reported due, together with his taxed costs.

And on like motion of Benedict & Benedict, proctors for the libellant, it is further ordered that unless an appeal be taken to this decree within the time limited and prescribed by the rules and practice of this court, that the clerk, after deducting the taxed costs of the officers of court, destribute the proceeds in satisfaction of this decree.

(Signed) SAM'L BLATCHFORD.

108 (Indorsed:) Vol. 18, No. 361, United States district court for the southern district of New York. John Low, jr., *vs.* The Steamer Western Metropolis, her tackle, &c. Benedict & Benedict, proctors for libel't. Final decree in rem. on confirmation of commissioner's report. Filed and entered the 4th day of June, 1868.

109 U. S. district court.

THE STEAMER "WESTERN METROPOLIS," &c., *ads.* JOHN LOW, JR.

SIR: Please to take notice that the claimant herein appeals from the decree of the court herein, and every part thereof.

Dated June 4, 1868.

Yours, &c.,

BEEBE, DONOHUE & COOKE,
For app'l't.

To GEO. F. BETTS,
Clerk U. S. district court.

(Indorsed:) John Low, jr., *vs.* The St'r "Western Metropolis." Notice of appeal to Geo. F. Betts, clerk, &c. Filed June 4th, 1868.

110

111 To the honorable the circuit court of the United States for the southern district of New York. The petition of appeal of Hiram Benner, claimant of the steamer Western Metropolis, her engine, boilers, &c., respectfully shows—

That on the 6th day of August, 1864, John Low, jr., filed a libel in the district court of the United States for the southern district of New York, against the steamer "Western Metropolis," her engines, &c., pray-

ing that said vessel might be condemned to pay the libellant's claim for damages sustained by a collision mentioned in said libel. That afterwards claimants duly intervened and claimed said vessel, and the sames was on bonds duly delivered to him. That the claimant duly answered in said cause, and thereafter the said cause was heard in said court, and such proceedings were had in said court that on the 4th day of June, 1868, a final decree was entered in favor of the libellant for the
112 sum of twenty-eight thousand one hundred and ninety-eight $\frac{68}{100}$ dollars, and said steamer and claimant condemned therefor. That the claimant alleges that the said decree and every part thereof is erroneous, and should be reversed. Wherefore the petitioner prays that the court would be pleased to hear the said cause anew on new pleadings and proofs, and to reverse and annull said judgment and to restore the claimant to all things he has lost in the premises.

BEEBE, DONOHUE & COOKE,
For app'l't.

113 Circuit court of the United States of America for the southern district of New York, in the second circuit.

JOHN LOW, JR., LIBELLANT, APPELLEE,
vs.
THE STEAMER "WESTERN METROPOLIS," HER tackle, &c., Hiram Benner, claimant & appellant.
} Bond for costs and damages on appeal.

Know all men by these presents that we, Hiram Benner, Lemuel Brown, William Pinckney, Nathaniel L. Griswold, Oliver Ditson, and E. R. Secomb, are held and firmly bound unto the above-named libellant & appellee in the sum of

dollars, to be paid to the said libellant, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the thirtieth day of July, in the year of our Lord one thousand eight hundred and sixty-eight.

Whereas the above named claimant ha prosecuted an appeal to the district court of the United States for the southern district of New York, in the second circuit, to reverse the decree rendered in the above entitled suit, by the judge of the district court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named claimant shall prosecute his appeal to effect and answer all damages and costs, if he fail to make his appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

HIRAM BENNER.	[SEAL.]
LEMUEL RROWN.	[SEAL.]
W'M PINCKNEY.	[SEAL.]
NATH. L. GRISWOLD.	[SEAL.]
E. R. SECOMB.	[SEAL.]
OLIVER DITSON.	[SEAL.]

Sealed and delivered, and taken and acknowledged, this 24th day of July, 1868, before me, as to all the subscribers except Oliver Ditson.

SEAL.] A. W. HALL,
Notary Public.

114 COMMONWEALTH OF MASSACHUSETTS,
County of Suffolk, ss:

Oliver Ditson, being duly sworn, deposes and says that he resides in the State of Massachusetts; that he is worth the sum of fifty-seven thousand dollars, over and above all his just debts and liabilities, & further acknowledges the above sig're at time to be his.

OLIVER DITSON.

Sworn & subscribed to this 24th day of July, A. D. 1868, before me.
[SEAL.] J. WATSON TAYLOR,
Notary Public, Boston, Mass.

(Indorsed:) Vol. 18, page 361, U. S. circuit court. John Low, jr., libellant, appellee, *vs.* The Steamer "Western Metropolis," her tackle Bond for costs on & damages on appeal. Beebe & Donohue, proctors, cl't's, & app'l't. Filed this 27th day of July, 1868.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Hiram Benner, Lemuel Brown, William Pinckney, Nathaniel L. Griswold, George Griswold, and E. R. Secomb, being each duly sworn, depose and say that he resides in the State of New York; that he is worth the sum of fifty-seven thousand dollars, over and above all his just debts and liabilities.

Sworn to before me this 24th day of July, A. D. 1868.

A. W. HALL,
Notary Public.

115 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court rooms in the city of New York, on Friday the eleventh day of February, in the year of our Lord one thousand eight hundred and seventy.

Present, the honorable Lewis B. Woodruff, circuit judge.

JOHN LOW, JR.,
vs.
THE STEAMSHIP "WESTERN METROPOLIS."

The appeal from the district court coming on to be heard,

Mr. R. D. Benedict reads from the apostles the evidence on part of the libellants and appellees.

Mr. W. M. Evarts reads from the apostles the evidence on part of the claimant and appellant.

Mr. E. C. Benedict is heard in reply.

C. A. V.

116

117 At a stated term of the circuit court of the United States for the southern district of New York, in the second circuit, held at the court-rooms in the city of New York, on the fifth day of May, 1870:

Present, Hon. Lewis B. Woodruff, judge.

JOHN LOW, JR., APPELLEE,
vs.
THE STEAMER WESTERN METROPOLIS, HER engine, &c., Hiram Benner, claimant & appellant.

This cause coming on to be heard on appeal, & having been argued by

the counsel for the respective parties, & due deliberation having been had, it is now ordered, adjudged, & decreed that the decree of the district court herein be, & the same is hereby, affirmed with costs, to be taxed.

118 And it is further ordered, adjudged, & decreed that John Low, jr., libellant, recover of said steamship Western Metropolis, her engine, tackle, &c., & of Hiram Benner, claimant & appellant, the sum

28,198 68 of twenty-eight thousand one hundred & ninety-eight $\frac{68}{100}$ dollars, the amount of the decree in the district court, with three

3,783 31 thousand seven hundred & eighty-three dollars & thirty-one cents, interest thereon to the date of this decree, together with

81 85 the sum of eighty-one $\frac{85}{100}$ dollars, the libellant's costs in this

32,063 84 court, as taxed, amounting in all to the sum of thirty-two thousand sixty-three dollars & eighty-four cents.

& it is further ordered that, unless an appeal be taken from this decree within the time allowed by law & the rules & practice of this court, the stipulators, on appeal, Lemuel Brown, William Pinckney, Nathaniel Griswold, George Griswold, Edward R. Secomb, & Oliver Ditson, cause their stipulation, on appeal, to be fulfilled.

L. B. WOODRUFF,
Circuit Judge.

(Endorsed:) U. S. circuit court. John Low, jr., vs. Steamer Western Metropolis. Decree. Benedict, Bum & Benedict, lib't's proctors.

119 Circuit court of the United States for the southern district of New York, second circuit.

THE STEAMSHIP "WESTERN METROPOLIS," &c., Hiram Benner, claimant, *ad'rs*
JOHN LOW, JR., LIBELLANT, APPELLEE.

To the honorable the Supreme Court of the United States:

The petition of appeal of Hiram Benner, claimants of the steamer Western Metropolis, respectfully show—

That the libellant above named filed his libel in the district court of the United States for the southern district of New York against the steamer Western Metropolis, her cargo, and claims that the schooner Triumph, owned by the libellant, together with her cargo, had been lost to the libellant in consequence of the negligence of those on the steamer.

That the claimant duly intervened and claimed said vessel, and

120 answered denying all the statement, and the cause was afterwards heard on the issues raised by the district court, and the said court decreed in favor of libellant.

That an appeal was duly taken by the claimant to the circuit court of the United States for the southern district of New York, which court, on the 5th day of May, 1870, duly affirmed said judgment and directed a decree in favor of the libellant for the amount of thirty-two thousand & sixty-three dollars & eighty four cents.

That the claimants allege and insist that the said decree is wrong, and ought to be reversed.

Wherefore the petitioner prays that the said Supreme Court may proceed to hear the said cause anew, and to reverse and amend the decree already rendered in said cause, and to dismiss said libel, and to restore to the claimants what they had lost in the premises.

BEEBE, DONOHUE & COOKE,
Proctors for App'l't.

121 (Endorsed:) U. S. Supreme Court. The Steamer "Western Metropolis," her tackle, &c., app'l'ts, ad's John Low, jr., appellee. Petition of appeal. Beebe, Donohue & Cooke, app'l't's proctors. Filed June 17, 1870. We hereby admit due & timely service of a copy of the within petition. Dated June 10th, 1870. Benedict & Benedict, proctors for lib'l'ts.

122

123 Circuit court of the United States of America for the southern district of New York, in the second circuit.

THE STEAMSHIP "WESTERN METROPOLIS," her tackle, &c., Hiram Benner, & al., cl'm'ts, app'l'ts,
vs.
JOHN LOW, JR., LIB'L'T, APPELLEE.

Bond for costs and damages on appeal.

Know all men by these presents that we, Hiram Benner, Lemuel Brown, William Pinkney, Oliver Ditson, E. R. Secomb, Nathaniel L. Griswold, & George Griswold, are held and firmly bound unto the above-named John Low, jr., in the sum of sixty thousand dollars, to be paid to the said John Low, jr., for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated thirtieth day of May, in the year of our Lord one thousand eight hundred and seventy.

Whereas the above-named claimants & appellants have pros-
124 ecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York,

Now, therefore, the condition of this obligation is such that if the above-named claimants & appellants shall prosecute their appeal to effect, and answer all damages and costs—if they fail to make their said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

HIRAM BENNER. [L. S.]
LEMUEL BROWN. [L. S.]
W'M PINKNEY. [L. S.]
E. E. SECOMB. [L. S.]
OLIVER DITSON. [L. S.]
P.p. NATH. & GEO. W. GRISWOLD. [L. S.]
JNO. H. WHIPPLE. [L. S.]

Sealed and delivered, and taken and acknowledged this 30th day of May, 1870, before me by Benner, Pinkney & Secombe.

A. W. HALL,
Notary Public, N. Y. Co.

And by Brown & Griswolds, by their att'y, this 4th day of June, 1870.

A. W. HALL,
Notary Public, N. Y. Co.

125 UNITED STATES OF AMERICA,
Southern District of New York, ss:

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it known on the 6th day of June, 1870, before me came and ap-

peared A. W. Whipple, to me known to be the att'y in fact for Nath'l & Geo. W. Griswold, and to hold power of attorney from them, and acknowledged that he executed the foregoing bond, as and for their act and deed, under said power of attorney.

A. W. HALL,
Notary Public, N. Y. Co.

Oliver Ditson, being duly sworn, doth depose and say, each for himself, that he is worth the sum of eighty thousand dollars over and above all his just debts and liabilities.

OLIVER DITSON.

Sworn to this first day of June, A. D. 1870, at the city of Boston, county of Suffolk, State of Massachusetts, before me.

[COMMISSIONER'S SEAL.] CHA'S B. F. ADAMS,
A Commissioner of the State of New York for Suffolk County, State of Massachusetts.

We approve of the form and sufficiency of the within bond. Dated June , 1870.

126 SOUTHERN DISTRICT OF NEW YORK:

Hiram Benner, being duly sworn, says, each for himself, that he is worth the sum of eighty thousand dollars over and above all his just debts and liabilities.

HIRAM BENNER.

Sworn to before me this 14 day of June, 1870.

[NOTARIAL SEAL.] A. W. HALL,
Notary Public, N. Y. Co.

(Endorsed:) Vol. ——, page ——. U. S. circuit court. The Steamship "Western Metropolis," her tackle, &c., Hiram Benner & al., cl'm'ts, app'l'ts, vs. John Low, jun'r, lib'l't, appellee. Bond for costs on appeal. Beebe, Dean & Donohue, app'l't's proctors. Approved June 16th, 1870. L. B. Woodruff, circuit judge.
Filed this 16th day of June, 1870.

127 By the honorable Lewis B. Woodruff, one of the judges of the circuit court of the United States for the southern district of New York, in the second circuit.

To John Low, jr., lib't appellee:

Whereas Hiram Benner, claimant, of the steamship "Western Metropolis," her engines, tackle, &c., lately appealed to the Supreme Court of the United States for the southern district of New York, made in favor of you, the said John Low, jun., against the said steamship "Western Metropolis," her engines, tackle, &c., and has filed the security required by law:

You are therefore hereby cited to appear before the said Supreme Court at the city of Washington, on the first Monday of December next, to do and receive what may appertain to justice to be done in the premises.

128 Given under my hand at the city of New York, in the southern district of New York, in the second circuit, the 16th day of June, in the year of our Lord one thousand eight hundred and seventy, and of the independence of the United States the ninety-fourth.

(Endorsed:) Vol. ——, page ——. U. S. Supreme Court. The steamship "Western Metropolis," her tacke, &c., Hiram Benner, cl't and appellant, vs. John Low, jun'r, lib't, appellee. Citation on appeal. Filed June 17, 1870. Beebe, Donohue & Cook, proctor for appellant. We admit due and timely service of a copy of the within citation, duly executed by the Hon. L. B. Woodruff. Benedict & Benedict, lib'l't's proctors.

(Indorsement on cover:) S. New York, C. C. U. S. No. 284. The steamship "Western Metropolis," Hiram Benner, claimant, appellant, vs. John Low, jr. Filed 11th November, 1870.

COMMISSION AND DEPOSITIONS.

SUPREME COURT OF THE UNITED STATES.

No. 88.

THE STEAMSHIP WESTERN METROPOLIS, HIRAM BENNER, CLAIMANT, APPELLANT,

vs.

JOHN LOW, JR.

FILED DECEMBER 7, 1871.

1 THE UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to Fisher Ames, esquire, United States commissioner, greeting:

Know ye that we, in confidence of your prudence and fidelity, have appointed you a commissioner, and by these presents do give you full power and authority, diligently to examine upon their corporal oaths, or affirmations, before you to be taken, and upon the interrogatories and cross-interrogatories hereunto annexed, Eben D. Campbell and Alexander McDougal, as witnesses, on the part of the appellant in a certain cause now pending undetermined in the Supreme Court of the United States, wherein the steamship Western Metropolis, Hiram Benner, claimant and appellant, vs. John Low, junior, appellee. And we do hereby require you, Fisher Ames, before whom such testimony may be taken
2 to reduce the same to writing, and to close it up under your hand and seal, and send by mail directed to Supreme Court of the United States, care of D. W. Middleton, esq., clerk, Washington, D. C. as soon as may be convenient after the execution of this commission, and that you return the same when executed, as above directed, with the title of the cause indorsed on the envelope of the commission.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, the first Monday of December, in the year of our Lord one thousand eight hundred and seventy.

D. W. MIDDLETON,
Clerk Supreme Court U. S.

Issued 25th November, 1871.

3 Interrogatories to be administered to Eben D. Campbell and Alexander McDougal, witnesses to be produced and examined on the part of the claimant and appellant, in a certain cause, civil and maritime, for collision, now pending on appeal in the Supreme Court of the United States, wherein John Low, j'r, is libellant, and The Steamship Western Metropolis, Hiram Benner, claimant and appellant, is respondent.

Interrogatories to Eben D. Campbell.

First. What is your name, age, residence, and occupation?

Second. Were you on board of the schooner "Triumph" at the time she came into collision with the steamer Western Metropolis, in March, 1864; if so, in what capacity, whether as captain, mate, seaman or otherwise?

Third. Were you examined, and did you testify as a witness on behalf of John Low, j'r, on the trial or hearing of the suit, growing out of the said collision, instituted by the said Low, as owner of the
4 schooner "Triumph," against The Steamer Western Metropolis, in the U. S. district court for the southern district of New York? Did you ask the said Low before giving your testimony in the said suit, or did he offer to give you any, and if any, what, sum or sums of money?

Fifth. Did you ask the said Low, before giving your testimony in the said suit, to promise or agree, verbally or in writing, to pay you any, and if any, what, amount of money, in the event that the said suit should be decided in his favor, and he should receive the money or damages claimed?

Sixth. Did the said Low, before you gave your testimony in the said suit, promise or agree in writing, to pay you any, and if any, what, sum of money, on the contingency and event that the said case should be decided in favor of the libellant, John Low, j'r, and he should receive the money or damages claimed?

Seventh. Look at the paper-writing hereto annexed, marked
5 Exhibit A, and state whether or not it is the agreement made with you by John Low, j'r, the libellant in said suit, before you testified in the said case. If you state that the said writing is the original agreement made with you by said Low, state whether it was signed in your presence, and by whom and when it was signed, and when, where, and by whom it was delivered to you.

Also, state whether the said John Low, whose name is signed to said agreement, or the son, is the libellant in the case of The Schooner Triumph against The Steamer Western Metropolis. Is John Low, j'r, the libellant in that case, or was he, at the time the said agreement was made, one of the firm of John Low & Son?

Eighth. Did you, after receiving the written agreement hereto annexed, (marked Exhibit A,) testify as a witness for the libellants in said suit?

Ninth. Was this agreement and promise unrevoked and in full
6 force and effect at the time you gave your testimony in the said collision suit?

Tenth. Did the said John Low, jr., before or after you gave your testimony in said suit, promise or agree, verbally or in writing, to give you, besides the amount mentioned in the written agreement hereto annexed, (marked Exhibit A,) any other and additional sum of money if he gained said suit? If so, state what other and additional amount he promised to pay you in that event, and when and where the said promise or agreement was made.

Eleventh. Do you know whether the said Low, or John Low & Son, promised or agreed to give any other person or persons on board of the said schooner Triumph, or the steamer Western Metropolis, at the time of the said collision, any sum or sums of money, after a recovery had
7 and obtained from said steamer? If so, state the name or names of such person or persons, and when and where such agreements, if any, were made, and on what consideration they or any of them were founded.

Twelfth. Do you know Alexander McDougal? If so, state the place of his residence, and when did he last go to sea; on what vessel, and to what place did he sail. State, also, how long he had been ashore before that last voyage?

Thirteenth. If you know McDougal, state whether he was on board of the Triumph, and in what capacity, at the time of the collision; and whether such an agreement as mentioned in the eleventh interrogatory was made with him before he gave his testimony in the said case, by John Low, jr., or by John Low & Son. If you state whether such an agreement was made by said parties, or either of them, with him, state the amount which was agreed or promised to be paid him after a recovery should be had from the said steamer.

8 Fourteenth. Was John Roberts a seaman on board of the steamer Western Metropolis at the time of said collision?

Fifteenth. Do you know any other matter or thing which may be of benefit to the appellant herein. If so, state the same as fully as if you were specially interrogated thereto.

Interrogatories to Alexander McDougal.

First. What is your name, age, residence, and occupation?

Second. Were you on board of the schooner Triumph at the time she came into collision with the steamer Western Metropolis, in March, 1864? If so, state in what capacity you were on board of said schooner.

Third. Were you examined as a witness for the libellant, John Low, jr., in the suit against The Steamer Western Metropolis in the U. S. district court for the southern district of New York, growing out of the collision between said steamer and the schooner Triumph, in
9 March, 1864? If so, state when and where you were examined, and gave your testimony.

Fourth. Did you ask the said Low, before you gave your testimony in said case, or did he offer to give you any, and, if any, what, sum or sums of money?

Fifth. Did you ask the said Low, before giving your testimony in said suit, to promise or agree, verbally or in writing, to pay you any, and, if any, what, sum or sums of money in the event that the said suit should be decided in his favor, and the money or damages claimed should be recovered?

Sixth. Did the said John Low, or any other of that name, before you gave your testimony, promise or agree, verbally or in writing, to pay you any, and what, sum of money, in the event that the said suit should be decided in favor of the libellant, and the money or damages
10 claimed should be recovered? If you state that such a promise or agreement was made with you in writing, state where said agreement now is, and annex the original, or a copy thereof, to your answer.

Seventh. If you state that a verbal promise or agreement was made by said John Low, or any other of that name, to or with you, before giving your testimony in the said suit, to pay you any sum of money, provided the case was decided in favor of libellant, and when the money or damages claimed were recovered, state where and when such promise or agreement was made.

Eighth. Do you know Eben D. Campbell? If so, state whether he offered to sell you a written agreement given him by said Low before the trial of said suit, to pay him seven hundred dollars when the libellant therein should succeed and get his damages. When was
11 such offer made by said Campbell to sell you said agreement?

Ninth. Do you know any other matter or thing which may be of benefit to the appellant herein? If so, state the same, as if you were specially interrogated thereto.

J. HUBLEY ASHTON,
Of Counsel for Appellant.

EXHIBIT A.

GLOUCESTER, *Jan'ry* 28, 1868.

We promise to pay Eben Cambell seven hundred dollars on demand, after getting money from case of sch. Trium'h, which case is now pending in New York.

JOHN LOW & SON.

(Written on back:) Rec'd of Alexander McDugel, the sum of thirty dollars for this paper.

E. D. CAMPBELL.

12 (Indorsed:) Supreme Court U. S. Dec. T., 1870. Steamer Western Metropolis. Hiram Benner, cl'm't & appellant, vs. John Low, j'r, appellee. No. 284. Interrogatories to witnesses to be examined under commission issued by order of the court in this case. Filed 17 November, 1871.

13 Cross-interrogatories to be administered to Eben D. Campbell & Alexander McDougal, in the case pending in appeal in the U. S. Supreme Court, wherein John Low, jr., is libellant against the Steamship Western Metropolis, &c.

To EBEN D. CAMPBELL:

First. Did you not, before receiving the written agreement, marked Exhibit A, refuse to go to New York to attend the trial of this cause, unless some such agreement was given you in writing? Had you not then already been several times to New York to attend the trial as a witness?

Second. Was any suggestion or request ever made to you by or on behalf of the libellant in this cause, that your evidence in the case should be anything but the truth?

Third. Was not the evidence given by you on the trial of the cause correct and true?

Fourth. Was not the agreement, Exhibit A, given to you to induce you to come to New York to testify in the cause?

Fifth. Were you influenced by such agreement to vary your evidence from the truth?

14 Sixth. Do you know Lemuel Brown, of the late firm of Benner & Brown, of New York City; was he not in Gloucester during the fall of 1870?

Seventh. Did said Brown have any communication with you in relation to your evidence in this cause; if so what?

Eighth. Was it not suggested to you by said Brown, or by some one else, in behalf of The Steamer "Western Metropolis," that if you would furnish any evidence that would assist the steamer in this case it would be of benefit to you; if so, what answer did you make?

Ninth. How did you come to part with the written agreement, Exhibit A; why did you part with it?

Cross-interrogatories to Alexander McDougal.

First. Did you not, at the request of the libellant, remain on shore on one occasion, instead of going to sea on a voyage, in order that you might give your evidence in this cause?

15 Second. If you have said that any promise was made by the libellant to pay you any money, now state whether it was not to pay you for so losing such voyage, and for your time and expenses?

Third. Was such promise made to you before or after you were examined as a witness?

Fourth. Was not the evidence given by you in the cause correct and true?

Fifth. Were you influenced by any promise of the libellant to vary your evidence from the truth?

Sixth. Did the libellant, or any one in his behalf, ever request you, or suggest to you, to give any evidence in the cause which was not strictly accurate and true?

Seventh. Did you buy of Eben D. Campbell the agreement in writing,

Exhibit A; what did you do with it after you bought it; when did you part with it, and to whom, and for how much?

16 Eighth. How did it happen that you purchased that agreement?

Ninth. Do you know Lemuel Brown, of the late firm of Benner & Brown, of New York City; was he not in Gloucester in the fall of 1870; were you not applied to by him before you bought said agreement to obtain the same; if not by him, were you not applied to by some one on the part of The Steamer Western Metropolis, or Hiram Benner; if you were who was it?

Tenth. Were you not applied to by said Brown, or some one else, on behalf of the Western Metropolis, at about the time you purchased said agreement, to give evidence in this cause that would be favorable to the steamer; and were not offers of money made to you if you would give such evidence; or was it not suggested to you that it would be made for your interest if you would give such evidence?

Eleventh. Were you not repaid the amount which you paid to Capt. Campbell for said agreement; if so, by whom and when; was that

17 all the money paid to you by him; if not how much were you paid?

E. C. BENEDICT,
Proctor for Libellant and Appellee.

18 (Indorsed:) 1870, Dec. term. U. S. Supreme Court. No. 284. John Low, jr., libellant & appellee, vs. The Steamship "Western Metropolis," &c. Hiram Benner, claimant & appellant. Cross-interrogatories to Eben D. Campbell & Alexander McDougal. E. C. Benedict, p'r for lib't & appellee. Filed 24th November, 1871.

19 Supreme Court of the United States.

STEAMSHIP "WESTERN METROPOLIS," HIRAM Benner, claimant & appellant,
vs.
JOHN LOW, JR., APPELLEE.

UNITED STATES OF AMERICA,
District of Massachusetts:

On the second day of December, A. D. 1871, and by adjournment on the fourth day of the said December, at Boston, in said district of Massachusetts, before me, Fisher Ames, the commissioner named in, and appointed by, the foregoing commission, and a commissioner in and for the district of Massachusetts to take affidavits and bail in civil causes depending in the courts of the United States, appointed by the circuit court of the United States for the first circuit, under the acts of Congress in such case made and provided, personally appeared Eben D. Campbell and Alexander McDougall, the witnesses named in the foregoing commission, and they being by me first carefully examined and cautioned, and sworn to testify the whole truth relative to the issue in the cause for which their depositions are taken, did depose and say, in answer to the interrogatories and cross-interrogatories set forth in the foregoing commission, and appended thereto, as follows, to wit:

20 Answers of the witness EBEN D. CAMPBELL to the direct interrogatories to him, as follows, to wit:

To the 1st interrogatory, he saith: My name is Eben D. Campbell;

age, fifty-one, or thereabouts; residence in Glo'cester, Massachusetts; occupation, sail-maker and mariner.

To the second interrogatory, he saith: I was; as captain of the schooner.

To the third interrogatory, he saith: I did.

To the fourth interrogatory, he saith: I think I asked him. I think he mentioned first giving me this amount of money and then neglected it, and I hung on to him and finally got it.

To the fifth interrogatory, he saith: I did ask him to do so. Seven hundred dollars, I think, was the amount.

21 To the sixth interrogatory, he saith: He promised, in writing, to pay me the sum of seven hundred dollars.

7. To the seventh interrogatory, he saith: Yes, sir; that is it. It was signed in my presence by John Low; he was junior then. I am not positive whether it was in January or February, 1868; I see it is dated January 28th, 1868. It was delivered to me by John Low; I think the same one that signed it, in Gloucester, on January 28th, 1868, I think. He gave it to me on the day that he wrote it. John Low, jr., owned the vessel and all the cargo. I don't know any further as to the facts in the case. Her papers read so. He owned the vessel, and I supposed he owned the cargo. I think he was a member of that firm at that time.

8. To the eighth interrogatory, he saith: I did.

9. To the ninth interrogatory, he saith: I had it in my posses-
22 sion. I regarded it as binding against Low, provided he got his case; otherwise it was null and void.

10. To the tenth interrogatory, he saith: He made no other agreement to pay me anything in the event of his winning the case; he gave me some detention money.

11. To the eleventh interrogatory, he saith: I do not know personally.

12. To the twelfth interrogatory, he saith: I know him; he resides at Gloucester. I don't know when he last went to sea, or on what vessel, or where she went, or how long he had been ashore.

13. To the thirteenth interrogatory, he saith: He was on board of the Triumph in the capacity of chief mate. I do not remember of their ever saying anything (F. A.) to me about agreements. I do not remember of any such agreement.

14. To the fourteenth interrogatory, he saith: I do not know, sir, personally

23 15. To the fifteenth interrogatory, he saith: Nothing more, sir, than what I have stated in my former testimony.

Answers of the witness, Eben D. Campbell, to the cross-interrogatories to him as follows, to wit:

To the first cross-interrogatory, he saith: I had been out several times with Mr. Low to New York before he gave me the writing, but not as witness. I don't remember going as witness until after he gave me the written agreement. I think I was called upon as a witness at the time he gave me the agreement, and started for New York on the same day that he gave it to me; that is my impression. He told me the case was coming up then, and I refused to go except he gave me this writing.

2. To the second cross-interrogatory, he saith: Not a word, sir, in no way.

3. To the third cross-interrogatory, he saith: It was, as near as I could give it.

4. To the fourth cross-interrogatory, he saith: I refused to go, and I suppose it will have to be called an inducement. I wouldn't leave my work except he gave me the agreement.

5. To the fifth cross-interrogatory, he saith: Not at all, sir; not in the least.

6. To the sixth cross-interrogatory, he saith: I have no acquaintance with him at all; I know him by sight. I think he was in Gloucester at that time.

7. To the seventh cross-interrogatory, he saith: He was talking over the matter about the collision; I do not remember what we said in the conversation about it.

8. To the eighth cross-interrogatory, he saith: No, sir; it was not.

9. To the ninth cross-interrogatory, he saith: Well, the mate and I was talking together about the matter one day after Mr. Low failed, and he made me an offer for it—I mean Mr. McDougall. I didn't suppose it was of any value to me or any one else then. I think he offered me twenty-five dollars first, if my memory serves me right. I think I told him he could have it for thirty dollars. He accordingly gave me thirty dollars for it after awhile, and I gave him the paper. He paid me something down and took the paper at the time, and paid me the rest afterwards.

EBEN D. CAMPBELL.

Answers of the witness ALEXANDER MCDOUGALL to the direct interrogatories to him, as follows, to wit:

To the first interrogatory, he saith: My name is Alexander McDougall; age, thirty-nine; residence, in Gloucester, Massachusetts; fisherman.

To the second interrogatory, he saith: Yes, sir; I was on board of her as chief mate.

To the third interrogatory, he saith: Yes; I was examined in Boston; I don't recollect exactly what year—what date it was. I think it was about the first of June. I don't remember what year it was.

To the fourth interrogatory, he saith: I never asked him for any; he offered me some money before I gave my testimony; he offered to give me four or five hundred dollars.

5. To the fifth interrogatory, he saith: No, sir; I did not.

6. To the sixth interrogatory, he saith: He promised to pay me some money if the suit should be decided in his favor—he never gave me any writing—he promised me four or five hundred dollars.

7. To the seventh interrogatory, he saith: In Gloucester; I can't say what month it was—I don't remember that—it was before I came up here to Boston—it was before I was examined.

8. To the eighth interrogatory, he saith: Yes, sir; I know him. Yes, sir; he offered to sell me the agreement—that was last year, sir—I couldn't say what month—I didn't keep no date.

9. To the ninth interrogatory, he saith: I don't know as I do.

Answers of the witness, Alexander McDougall, to the cross-interrogatories to him, as follows, to wit:

1. To the first cross-interrogatory, he saith: Yes, sir.

2. To the second cross-interrogatory, he saith: No, sir; he didn't say it was for losing my voyage. He said he wanted me to stay and he would pay me this money.

3. To the third cross-interrogatory, he saith: Before, sir.

4. To the fourth cross-interrogatory, he saith: Yes, sir.

5. To the fifth cross-interrogatory, he saith: No, sir.

6. To the sixth cross-interrogatory, he saith: No, sir; I don't remember as they ever did.

7. To the seventh cross-interrogatory, he saith: Yes sir; I sold it last year, I think, about the last of October or first of November. I don't know the man's name to whom I sold it; I sold it for forty dollars.

29 8. To the eighth cross-interrogatory, he saith: Campbell offered to sell it to me. A man came to my house and asked me if I had any agreement from Mr. Low, and I told him I didn't have any myself—no writings. He wanted to know if I had any writings; I told him I didn't. He told me he would pay me for it if I had one; so I bought this one of Mr. Campbell, and sold it, I think, to the same man—he was a stranger to me.

9. To the ninth cross-interrogatory, he saith: I have seen the man, or somebody by the name of Brown, who was in Gloucester in the fall of 1870. I was not applied to by him to obtain said agreement. I don't whether the man who applied to me did so on behalf of the steamer or Mr. Benner, or who. I don't know his name.

10. To the tenth cross-interrogatory, he saith: Yes, sir; no offers of money were made to me. They applied to me to give evidence

30 about this money that was promised me by Mr. Low—it was not suggested that it would be made for my interest if I would give such evidence.

11. To the eleventh cross interrogatory, he saith: No sir; I sold it as I have stated before and got the money for it. I don't know the man's name. It was about the last of October or first of November, last year. Forty dollars was all the money he paid me.

ALEX. McDOUGALL.

31 UNITED STATES OF AMERICA,
District of Massachusetts:

I, Fisher Ames, the commissioner named in, and appointed by, the foregoing commission, and a commissioner in and for the district of Massachusetts, appointed by the circuit court of the United States for the first circuit, under the act of Congress authorizing the appointment of commissioners "for the more convenient taking of affidavits and bail, to be used in civil causes, depending in the courts of the United States," and the acts additional thereto, do hereby certify that, pursuant to the foregoing commission, on the second day of December A. D. 1871, I was attended at my office, number 2 (two) Pemberton Square, in Boston in said district of Massachusetts, by Eben D. Campbell and Alexander McDougall, the witnesses named in said foregoing commission, and they, the said witnesses, were then and there by me, first carefully examined and cautioned, and sworn to testify the whole truth relative to the issue in the cause for which their depositions are taken; that further proceedings under said foregoing commission were adjourned to Monday, December fourth, A. D. 1871; and that upon said fourth day of December 1871, pursuant to said adjournment, the said witnesses, Eben D.

32 Campbell and Alexander McDougall appeared at my said office, in Boston aforesaid, and separately and apart, respectively gave the answers hereinbefore set forth, to the interrogatories and cross-interrogatories appended to said foregoing commission; and the testimony given by each of them was by me reduced to writing in the presence of each of said witnesses respectively, and that each of said witnesses subscribed the same respectively, as and for his deposition, in my presence;

and that I have retained the said depositions in my possession for the purpose of forwarding the same, under my own hand, to the court for which they were taken, with this certificate.

I further certify that said witnesses are of sound mind and lawful age; and that I am not of counsel or attorney to either of the parties in the cause for which the said depositions were taken, nor in any way interested in the event of said cause.

In testimony whereof I have hereunto set my hand and seal this fourth day of December, in the year of our Lord eighteen hundred & seventy-one.

[SEAL.] FISHER AMES,

Commissioner under the foregoing Commission, and United States Commissioner for the District of Massachusetts.

Commissioner's fees, $20.

33 (Indorsed:) U. S. Supreme Court. Dec. term, 1871. No. 88. Steamship Western Metropolis, Hiram Benner, claimant & appellant, vs. John Low, jr., appellee. Commission. Interrogatories & depositions of Eben D. Campbell and Alexander McDougall to be used in above cause. Taken and sealed up by me, Fisher Ames, U. S. commissioner, dist. of Massachusetts. Filed Dec. 7th, 1871.

REC. 88—2

Supreme Court of the United States.

DECEMBER TERM, 1871.—No. 88.

THE STEAMSHIP WESTERN METROPOLIS, HIRAM BENNER, Claimant and Appellant,

vs.

JOHN LOW, Jr., Appellee.

APPEAL FROM THE CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANT.

J. HUBLEY ASHTON,
Of Counsel.

McGill & Witherow, Printers 1107 E street, Washington, D.C.

Supreme Court of the United States.

DECEMBER TERM, 1871.

THE STEAMSHIP WESTERN METROPOLIS, Hiram Benner, Claimant and Appellant

vs.

JOHN LOW, Jr., Appellee.

No. 88.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF APPELLANT.

Statement of the Case.

First. This is an appeal, by the owner of the steamship Western Metropolis, libeled by John Low, Jr., owner of the schooner Triumph, for damages sustained by the schooner in a collision between the two vessels, on the 17th of March, 1864, from a decree of the circuit court for the southern district of New York, affirming the decree of the district court, which pronounced against the steamship, and awarding to the libellant the sum of thirty-two thousand sixty-three dollars and eighty-four cents, ($32,063 84.)

Decrees of District Court, Rec., pp. 32, 33.

Decree of Circuit Court, Rec., p. 37.

The principal, indeed it may be said the only evidence, for the libellant consisted of the testimony of three men who were on board of the schooner at the time of the

collision—Eben D. Campbell, the master of the schooner, Alexander McDougal, the mate, and John Penticost, one of the seamen.

Dep. of Campbell, Rec., pp. 23, 24.
" of McDougal, Rec., pp. 15–19.
" of Penticost, Rec., pp. 10–15.

The other witnesses examined for libellant did not see the collision, which occurred in March, 1864, and were called in May and October, 1866, to prove, it would seem, the character of the night, weather, and wind at twenty minutes before 4 o'clock on the morning of the 17th of March, 1864, more than two years before.

Dep. of Thompson, Rec., p. 19.
" of Crowell, Rec., p. 21.
" of Colby, Rec., p. 22.

The evidence for the steamship Western Metropolis consisted of the testimony of W. B. Hilton, the captain of the steamship; E. H. Daggett, the pilot; Thomas Wood, the lookout on the forecastle, who reported the schooner; Samuel Adams, the quartermaster at the wheel; Charles W. Adams, the chief officer of the steamship, who was on the bridge at the time of the collision; M. L. Woodhull, the 1st assistant engineer on duty at the engine; W. T. Taylor, the ship's storekeeper; W. A. Lighthall and Franklin Clark, on board as passengers.

Dep. of Hilton, Rec., p. 29.
" of Daggett, Rec., p. 28.
" of Wood, Rec., p. 26, 27.
" of Samuel Adams, Rec., p. 31.
" of C. W. Adams, Rec., p. 30.
" of Woodhull, Rec., p. 25.
" of Taylor, Rec., p. 26.
" of Lighthall, Rec., p. 25.
" of Clark, Rec., p. 26.

The appellant having ascertained, after the present appeal was perfected, that corrupt agreements had been

made by Low, the libellant, with persons on board the schooner and the steamship, for the payment of money in the event of his succeeding in this suit, and particularly with his two leading witnesses, Campbell and McDougal, master and mate of the schooner Triumph, applied to this court for an order directing the testimony of these men to be taken upon a commission issued under the 12th rule of the Supreme Court, in regard to the agreements entered into with them by the libellant, before giving their testimony in the cause, for the payment of money in the event of a recovery in this suit.

Such an order having been made by the court, the testimony of Campbell and McDougal, the master and mate of the schooner, has been taken on this subject, and will be before the court in connection with the present record.

The agreements made with them by Low, the libellant, before they testified, and, as the court will believe, in consideration of giving such testimony as was deemed necessary to condemn the steamer, are fully proved by the admissions of these men.

Campbell states that, before he testified, Low, the libellant, gave him a written promise to pay him $700, after getting the money from this case; and that he gave him, in addition, "*some detention money.*" (Rec. of Commission and Depositions, pp. 3, 6; *answer* to 10th int.) The agreement is dated January 28, 1868, and Campbell testified on April 21, 1868. (Rec., p. 23.) McDougal states that Low promised, before he came to Boston to testify, to pay him four or five hundred dollars, if the suit should be decided in his favor; and that Low offered him some money before he gave his testimony. (Rec. of Commission, p. 7.) McDougal testified, as to the collision, before a commissioner in Boston, on May 30, 1866. (Rec., p. 15.)

The court cannot, we think, doubt that these men were influenced by this consideration to testify as they did, and that their evidence is wholly untrustworthy; and we believe that the court will not hesitate to disregard it utterly, in determining the question of liability for this collision.

If the testimony of Campbell and McDougal is thrown out of the case, as it must be, there is left nothing but the testimony of Penticost, the seaman, to oppose the abundant proof afforded by the evidence of the intelligent and honorable witnesses for the steamer.

Second. Such being the *proofs*, we will now state briefly the admitted and controverted facts of the case.

The collision occurred at or about twenty minutes before four o'clock on the morning of the 17th of March, 1864, in Vineyard sound, near the Nantucket shoals.

The schooner, a vessel of little more than one hundred tons, was on a voyage, with a cargo of fish, from Gloucester to New York. The Western Metropolis, a large ocean steamer, was bound to Boston, having left New York about four o'clock in the afternoon of the previous day. (Dep. of Wood, Rec., p. 27.)

The libel alleges that the schooner was, at the time of the accident, close-hauled on her starboard tack, the wind being northwest by west, and was going six knots an hour, upon a course about west southwest. (Rec., p. 1.)

She was struck by the steamer on her starboard side. Two of the men on the schooner were drowned, and the rest were saved by a boat from the steamship sent to their rescue.

The libellant's theory is, that the night was clear and starlight; that the schooner had, in the starboard forerigging, a lantern, containing a bright white light; that the lights of the steamer were seen brightly burning from the schooner some distance off, (Campbell says 2½ miles, Rec., p. 24,) bearing west half south, and going east-southeast, just after the schooner had changed to the tack she was on at the collision; and that it was at first supposed she would go to the north of the schooner, but, instead of keeping her course, the steamer swung to her starboard, and, without slacking her speed, kept swinging in that direction toward the schooner, as the latter went on close-hauled, until the collision.

The theory, in brief, is, that the schooner kept on her course, close-hauled, heading west-southwest, and that the steamer, on a clear, starlight night, with a bright white light on the schooner in full view, changed her course, and, swinging to her starboard, persistently followed up the schooner until she ran into and sank her.

This theory, advanced in the libel, is that, with all its requirements, which the master and mate of the schooner we are now certain were promised a large reward to support by their testimony on the trial.

The outline of the claimant's case is this:

1. The steamship, prior to the collision, was proceeding at the moderate speed of between seven and eight miles an hour with the current, which, as the libel itself states, was running to the east with the steamer, at the rate of four or five knots an hour, (Rec., p. 1;) thus giving the steamship some four miles per hour by steam, which was as slow, we shall contend, as it would have been prudent for her to move, with reference to her steerage-way or her proper subjection to the helm.

It is proved that the steamship was running slow by orders, at a speed not greater than 7 or 8 knots with the tide, and that she was capable of making 16 knots an hour. (Dep. of Woodhull, Engineer, Rec., p. 25.)

The night was not clear or starlight; it was dark, thick, and hazy at the time of the collision. The abundant evidence of this fact will be presently mentioned.

The schooner exhibited no light. The evidence of this fact produced by the claimant is ample; and the testimony to the contrary is from the mouths of Campbell and McDougal. Although the two men on the lookout on the forecastle were at their posts on the starboard and larboard sides of the ship; although the chief officer was on the bridge, forward of the pilot-house, keeping a lookout; and the pilot and quartermaster were at the wheel, looking ahead in the direction of the schooner, the schooner was not seen until one and a half or two minutes (probably less) before the vessels came together; and as soon as she

was seen, without an instant's delay, the pilot rang to stop, and back the ship. The orders were obeyed promptly. The engine made two or three revolutions back; but the vessels were too close for time to reduce the headway of the steamer and prevent the accident.

Coming, as the schooner was, without lights, on that hazy night, and being but one and a half or two minutes off when first reported and seen by the pilot, there were obviously no means or time for the pilot to determine the direction in which the schooner was heading—whether she was on the starboard or port tack; and, in this situation of danger and doubt, wholly the fault of the schooner, as we shall contend, (but, whether so or not, certainly not the fault of the steamer,) the pilot acted as he thought best in the emergency, and ordered the quartermaster to port the wheel. "I gave the orders to port the wheel, and rang the bells (to stop and back) as quick as it could be done."

(Dep. of Pilot, Rec., p. 28.)

2. Now, the court below supposed that this porting of the helm was a fault, on the part of the steamship, that led to the collision. The learned circuit judge supposed that it *swung* her around to starboard, so as to place her in pursuit of the schooner, or to bring her on a line converging to the schooner's course, and meeting it precisely at the place of collision; and that, if the helm had been kept steady, or heaved to starboard, the accident would not have happened. But we shall submit, that nothing can be more erroneous than this view of the case.

It is self-evident, as we shall respectfully submit, that the porting of the helm could not have had this effect on the course of the steamship. Her course could not have been changed in a minute and a half or two minutes.

The court will readily understand, that it would require, in the case of such a vessel, at least that length of time to change the wheel from port to starboard.

The Western Metropolis was not a ferry boat, or a river

steamer, but an ocean steamship; and the course of such a vessel cannot be changed, by a turn of the helm, in a moment. We think it will be apparent to the court that the manœuvre of porting the helm did *not* contribute in the least degree to the collision, and that, if the helm had been put to starboard, or kept steady, instead of being ported, the result would have been the same.

The learned judge below was doubtless led into the error of attributing the collision to this movement of the steamship, partly by failing to remember that what might have been, under similar circumstances, possible in the case of a ferry boat or river steamer, was impossible in the navigation of a steamship like the Western Metropolis, and partly also by giving effect to what we have the right now to treat as the false and absurd testimony of the master of the schooner and the seaman Penticost, who support the theory of the libel, that the steamship swung on a port helm, directly toward and upon the schooner's course.

That as soon as the schooner was reported, the helm of the steamship was ported, while the steamer, at the same instant, was stopped and backed, is true; but that this manœuvre swung her around to starboard, so as to place her in pursuit of the schooner, and brought about a collision, which otherwise might not have happened, is *not* true; for it was physically impossible, and there is no evidence to prove it, except the discredited testimony produced from the schooner.

3. But if the porting of the helm in fact contributed to the collision, the steamship cannot be visited with punishment; as the error was caused by the fault of the schooner in sailing, on such a night, without a light, to give timely notice of her position and course to an approaching vessel.

The idea that there was time, from the moment the schooner was descried by the pilot to the collision, for the pilot to tell that the schooner was heading south, across the course of the steamer, and that the proper manœuvre was to heave the helm to starboard, is most erroneous.

We may say, without fear of contradiction by any one well acquainted with nautical matters, that a *minute* is *not* sufficient time to enable any pilot to tell at sea, on a dark night, the course of a vessel, without the red and green lights prescribed by the act of April 29, 1864, passed unfortunately about a month after the present collision.

If this schooner had carried a red light on her port and a green light on her starboard bow, the pilot of the steamer would have seen, at the instant he descried her, that she was heading southward, that her starboard side was presented to the steamer, and that she was on the starboard tack.

But, in the absence of such lights, the time allowed the pilot was plainly not sufficient for him to form any deliberate judgment, as to the position of the approximating schooner, and to make the proper manœuvre to avoid her.

4. There is another answer, however, to the objection made to the porting of the steamer's helm, aside from the fault imputable to the schooner in omitting to carry a light: and that is, the movement seemed to the pilot, in the emergency, that which would be most likely to attain the object he had in view, of avoiding the schooner, and, unless the steamer was originally in fault in not discovering the schooner, when at a sufficient distance to avoid her by changing her course, the movement, though it did change the ~~schooner~~ steamer's course, cannot be imputed as a fault to the steamer, and subject her to damages.

This court has often said the rules of navigation are not strictly applied to a vessel, otherwise without fault, in cases where the proximity of the vessels is so close, that the collision is inevitable. (The Johnson, 9 Wall., 153.)

5. The case of the appellant is, in the main, then, briefly this: The steamship was proceeding at a moderate rate of speed, in a night quite dark, and in a hazy atmosphere; there was no light on this schooner, and there was no fault in not seeing her before she was observed; she was descried, by lookout and pilot, about a minute and a half, or two minutes, before the vessels struck; the orders to stop

and reverse the engine were promptly given, and as promptly obeyed; and this was all that could be done to save the schooner; the porting of the helm did *not* change the steamer's course, or contribute at all to bring the vessels together: but if it *did*, the steamer is not to blame for the improper manœuvre, as the schooner's fault in sailing without a light brought the vessels so close, that there was no time before the collision for the pilot to observe the course of the schooner, and make advisedly the proper manœuvre to avert the collision.

And, moreover, if the porting of the helm *did* change the ~~schooner~~ steamer's course, the movement was one which, in the emergency, appeared to be most likely to attain the object; and, whether caused by the schooner's fault or not, the steamer, being without fault, cannot be condemned for it.

Propositions of Fact and Law.

It will be contended, on behalf of appellant—

First. That the schooner was solely to blame for the collision, and the decree below must, therefore, be reversed, and the libel dismissed.

Under this head, it will be contended—

1. That the proper conclusion from the evidence is, that the schooner had no light on the night in question.

2. That the night and atmosphere were such as imposed on her the duty of exhibiting a proper light or lights.

3. That the steamship was navigated with proper care and caution; her officers, pilot, and lookouts were competent and vigilant; and she did all that could be done, by stopping and backing, to prevent the collision.

4. That the steamship cannot be blamed for porting her helm at the crisis of collision:

(*a*) Because the movement did not contribute to the collision.

(*b*) Because, if it did, it was the fault of the schooner that the vessels were brought into such proximity that the

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But, in the absence of such lights, the time allowed the pilot was plainly not sufficient for him to form any deliberate judgment, as to the position of the approximating schooner, and to make the proper manœuvre to avoid her.

4. There is another answer, however, to the objection made to the porting of the steamer's helm, aside from the fault imputable to the schooner in omitting to carry a light: and that is, the movement seemed to the pilot, in the emergency, that which would be most likely to attain the object he had in view, of avoiding the schooner, and, unless the steamer was originally in fault in not discovering the schooner, when at a sufficient distance to avoid her by changing her course, the movement, though it did change the ~~schooner~~ steamer's course, cannot be imputed as a fault to the steamer, and subject her to damages.

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2. That the night and atmosphere were such as imposed on her the duty of exhibiting a proper light or lights.

3. That the steamship was navigated with proper care and caution; her officers, pilot, and lookouts were competent and vigilant; and she did all that could be done, by stopping and backing, to prevent the collision.

4. That the steamship cannot be blamed for porting her helm at the crisis of collision:

(*a*) Because the movement did not contribute to the collision.

(*b*) Because, if it did, it was the fault of the schooner that the vessels were brought into such proximity that the

pilot of the steamer had no time to judge of the course of the schooner.

Second. That if the court should be of opinion that the steamship was not in fault, it is immaterial to inquire whether any blame is imputable to the schooner; as, in that event, the steamer is not liable for the damages sustained by the schooner, and the decree must be reversed.

Third. That if any blame can be attached to the steamer, the schooner was also in fault, and the case is, in that view, one for an apportionment of the damages.

Argument for the Appellant.

We are aware that it is not the general practice of this court to scrutinize very carefully the weight of evidence in cases of collision, where the evidence is substantially conflicting, and where both district and circuit courts have concurred in a decree on the merits.

This case, however, is taken out of the application of that rule by the effect of the new evidence, obtained in this court, which shows, as already observed, that the testimony produced by the libellant, and which led to the decision of the learned district and circuit courts, cannot be trusted as the basis of any judicial determination or decree. It is not necessary that the court should believe that Campbell and McDougal perjured themselves in order to reject their testimony. The interest they are shown to have had in the *event* of this suit is quite sufficient to warrant the court in disbelieving it. Without the aid of the act of July 2, 1864, abolishing the rule of incompetency on account of interest in civil cases in the courts of the United States, these men would not be competent witnesses; for by the rules of the admiralty law interested witnesses are excluded, except in certain cases, where they are admitted *ex necessitate.* (The Independence, 2 Curtis, 354.) The exception, Judge Story said, was only in cases of salvors, who were allowed *ex necessitate* to give testimony

only to facts involved in the original claim, but not to facts capable of distinct and independent proof. (The Boston, 1 Sumner, 343.)

Judge Story, in that case, says: "Of course the evidence, (in the case of salvors,) being of interested persons, is in the nature of semi-plenary evidence only, and will weigh little unless corroborated by other circumstances. It will be of little weight, when it leaves behind it disinterested testimony; *and it will be greatly abated in force by opposing testimony from persons belonging to the crew of the saved ship.*"

But the circumstances under which they acquired their interest, as disclosed by themselves, are sufficient to warrant the conclusion, not only that these men swore falsely, and the libellant knew it, but that all the testimony from the schooner is tainted with corruption.

We apprehend, therefore, that this court will deem it due to the cause of justice to scrutinize the evidence contained in this record, that the great wrong perpetrated by this libellant, not only to the private interests and rights of the claimant, but against the administration of justice itself, may not reap its unholy fruits.

We pass now to a brief consideration of the several propositions of fact and law which we desire to submit to the court:

First Proposition.

The schooner Triumph was solely to blame for this collision, and the decree below, therefore, should be reversed and the libel dismissed.

1. *The proper conclusion, from the evidence, is, that the schooner exhibited no light on the night in question.*

(*a*) Every person on the steamer who was looking out on that night, and who saw the schooner before the collision, swears that he saw no light burning at the time.

The *pilot* swears: "I was looking in that direction when the lookout made the report. I had night glasses in my

hands. I saw no light on that vessel. I had a full view of her as soon as I got my glass on her." (Dep. of Daggett, Rec., p. 28.)

The *lookout* Wood swears: "I saw the vessel ahead; she had no light that I could see." (Dep. of Wood, Rec., p. 26.)

The *chief officer* swears: "I was on the bridge prior to the report of the lookout as to the 'Triumph.' I was keeping a lookout. If there had been a light on that vessel, I think I could have seen it. There was nothing on board our vessel, or anything between us and the schooner, to prevent me seeing the light, had there been one." (Dep. of C. W. Adams, Rec., p. 30.)

The *quartermaster* at the wheel says: "There was no light on the schooner; I did not see any." (Dep. of C. W. Adams, Rec., p. 31.)

(*b*) Everybody on board the steamer, who talked with the men, Campbell, McDougal, and Penticost, after they were brought aboard, swears that they admitted they had no light on the schooner.

Captain Hilton says so. (Rec. p. 29.)

Samuel Adams states: "I heard one of them say they had no light on board." (Rec., p. 32.)

W. T. Taylor says: "I heard some talk about light in cabin; they said they had no light." (Rec., p. 26.)

And Mr. Lighthall, the passenger, who was entirely disinterested and impartial, says: "I talked with the captain; he said he had no light up. I was a passenger on the Western Metropolis. Captain said to me they had no light up. I asked him if he had a light, and he said no; *they went down to get a light when they saw the vessel.* I had a long conversation with him, and felt very sorry for him." (Rec., p. 25.)

(*c*) The witnesses for the schooner say that the light was hung in the *starboard* fore-rigging; that is to say, on the side where it might be seen by *this* steamer. But that was no place for a light on a vessel at sea on such a night, as

the sails would prevent its being seen at all by a vessel on the *port* side.

If this steamer had been going in the opposite direction, the light, where these men say it was put, could not have been seen by her at all.

Besides, we believe the starboard forerigging is not the customary place for a light on such a vessel under way. If they had said the light was on the bowsprit, or on the forepeak, so as to be visible around the compass, the story would have had a greater semblance of truth. But when they place it precisely where it would be visible, if in fact exhibited, to the Western Metropolis, though not visible to a vessel on the port side of the schooner, when on her starboard tack, the story on its face looks as if it had been made for this case.

(*d*) As we have said, however, it is not probable this court will believe these men, as against the evidence, that the light was not seen, and that they admitted to everybody, when on the steamer, that they had no light.

(*e*) The only account these men give of the light is, that it was a white light in a *lantern*. (Rec., p. 18.) By "proper lights," said Lord Westbury, delivering the judgment of the privy council in the case of '*The Samphire*,' "we mean such lights as, with reasonable care on the part of the *Samphire*, must have been seen by the *Samphire* in time to prevent a collision." (Holt's Rule of the Road, 1867, p. 197.)

The evidence for the schooner by no means proves, even if credited, that she had such a light; for the dark side of the lantern may have been turned toward the steamer at this particular time. It is not stated that the light was in a globular lantern, so constructed as to throw a clear, uniform, and unbroken light all around the horizon.

In the case of *The Brig Jas. Gray* v. *The Ship John Fraser*, (21 How., 188,) this very difficulty occurred. The ship there, while lying in Charleston harbor, had a triangular lantern, with one side dark, the light only shining through the other two sides, and not being visible to those on the dark side. This court pronounced against the ship, as in

fault, for not having a light that was visible around the horizon.

So here, the light may have been seen from the deck of the schooner, and, for all that appears, may not have been visible to the steamer. There is no evidence, giving full effect to the schooner's testimony, that the lantern containing it was of such a construction as that the light, with reasonable care, must have been seen by the Western Metropolis in time to avoid the collision.

2. *The night and atmosphere were of such a character as imposed on this schooner the duty of carrying and exhibiting a proper light or proper lights.*

(*a*) The witnesses for the schooner describe it as a fine, clear, starlight night, and one of them says there were a few northern lights in the heavens. (Campbell, Rec., p. 24; Penticost, Rec., p. 10.) And yet they profess to have been carrying a bright white light in the rigging at this time. Why, it may be asked, exhibit a light at all on such a night?

But the testimony of the witnesses for the steamer, under the circumstances of the case, must be regarded as conclusive on this point. They variously describe the night as dark and thick, and the atmosphere as heavy, hazy, cloudy, foggy.

Lighthall says it was foggy, (Rec. p. 25;) Woodhull, that the atmosphere was heavy, (Rec., p. 25:) Clark, that the night was thick and heavy, (Rec., p. 26;) Taylor, that it was dark and thick that night, (Rec., p. 26;) Wood, that the night was rather foggy, and quite a vapor rising from the water, (Rec., p. 26;) he says he did not know what sort of a vessel she was; *it was too thick*, (Rec., p. 27;) Daggett, that it was very hazy around the water, (Rec., p. 28;) Hilton, that the night was dark and hazy, (Rec. p. 29;) C. W. Adams, that the night was dark and cloudy, (Rec., p. 30;) Samuel Adams, that the night was dark, thick, and hazy at the time of the collision, (Rec., p. 31.)

This is the direct evidence. The indirect evidence that the schooner was not seen until a minute and a half, or, farthest, two minutes before the collision, is a strong corroborative circumstance.

But there is one *other* circumstance which shows how dark the night was. We refer to the evidence in the record, showing that the boat from the steamer, which rescued the men from the wreck, had difficulty in finding the wreck, and that the boat did not get back to the steamer till daylight. Adams says: "The little boat did not get back till daylight; and did not see her after she left us. (Rec., p. 32.)

Penticost says: "We kept *hollering* until the small boat got near us, and then knocked off *hollering* when they could see where we were." (Rec., p. 13.)

Wood, in speaking of the steamer blowing her fog-whistle, may have referred to what occurred while the small boat was in search of the wreck, as it is not improbable the steamer did blow her whistle to attract the attention of the boat, just as the men on the mast found it necessary to keep "hollering," as Penticost says, to enable the small boat to find them.

(*b*) This collision occurred about a month before the passage of the act of 1864, chapter 69, prescribing rules concerning lights for steamers and sailing vessels, (13 Stats., 58,) and is governed, therefore, by the maritime law, as settled by this court, existing before that act was passed.

The rule, as laid down and enforced by this court and its learned justices on the circuit, was, that the duty of a vessel to carry a light depended somewhat on the circumstances of the case; that, on a clear moonlight night, when there could be no difficulty, with proper lookouts, in seeing a sufficient distance to enable approaching vessels to take in time the proper measures to avoid her, it was not generally obligatory on a vessel under sail to exhibit signal lights; but that on a dark night, or when the weather was thick and cloudy, an omission to exhibit a proper signal light was a fault; and if it caused or contributed in any

degree to a collision, the vessel guilty of the fault must reap its fruits.

St. John *v.* Payne *et al.*, 10 How., 586.
Rogers *v.* Steamer St. Charles, 19 How., 110.
Propeller Niagara *v.* Cordes *et al.*, 21 How., 7.
Nelson *v.* Leland, 22 How., 48.
Brig Gray *v.* Ship Fraser, 21 How., 188.
The Louisiana *v.* Fisher, 21 How., 6.
The New York *v.* Rea, 18 How., 225.
Chamberlain *v.* Ward, 21 How., 565.

The characteristic words of the lamented Mr. Justice Grier, in *Barque Delaware* v. *Steamer Osprey*, (2 Wallace, Jr., 275,) are pertinent:

"The court cannot establish any rule to bind vessels navigating the high seas after dark to carry signal lights; but where one does this and the other does not, we can and will treat (in a case *cæteris paribus*) the dark boat as the wrong-doer, and liable to make reparation. In rivers and narrow channels, and in harbors, there are generally local regulations requiring it. But if there be not, it would still be advisable for vessels sailing either in close or open channels to keep proper lights, if they wish to seek the courts in case of collision."

In the case of *The Santa Claus*, (1 Bl. C. C. R., 370,) Mr. Justice Nelson held that, when a vessel navigating the Hudson on a dark night, the weather being thick and cloudy, carried but *one* light, and, though in fact moving, led those on board another vessel thereby to suppose she was at anchor, she was guilty of negligence, and must bear the consequence of a collision which she had thus contributed to produce.

The rule of the English admiralty, previous to the late regulations, was the same. The case of *The Victoria* (3 W. Rob., 53) furnishes an illustration: where Dr. Lushington, on the advice of the Trinity Masters, that it was the duty of the vessel, under the circumstances of her situation, to have had a visible light burning, refused to give the damages claimed for the collision.

3. *The steamship was navigated with proper care and caution; her officers, lookouts, and pilot, were competent and vigilant; and she did all that could be done by stopping and backing to avoid a collision.*

(*a*) The *speed* of the steamship was not too great for prudent and safe navigation.

It was between 7 and 8 miles per hour, *with the tide.* (Rec., p. 29.) The tide was running with the steamer at the rate of 4 or 5 knots, as the libel states. (Rec., p. 1.) Her speed was not, therefore, more than 4 miles an hour by *steam.* The engineer says: "Prior to time the bells rung the W. M. was making between 7 and 8 knots, running slow. I have seen her make 16 knots; she ran slow by orders." (Rec., p. 25.)

It is plain that this was about as slow as such a vessel could well run. It is neccessary, as is well known, that a steamer should run at a certain speed, in order to give her steerage way, or place her under command of the helm.

It is a question of fact, in each particular case, whether the speed is excessive or not; and, in determining this, all the circumstances attending the case are to be fully considered. (Newton *v.* Stebbins, 10 How., 606; The Syracuse, 9 Wall., 672; The Northern Indiana, 3 Bl. C. C., 92.)

We cannot think the court will say, that a speed of four miles an hour by steam, in the locality of this collision, was greater than could be maintained by this steamship, with due regard to the safety of other vessels taking the necessary precautions to signal their approach or proximity by proper lights.

(*b*) The *lookouts* were such as are required by the decisions of this court. (Chamberlain *v.* Ward, 21 How., 553; The Genesee Chief, 12 How., 443.)

They were stationed on the forecastle, on both sides of the ship, and actually employed in the performance of the duty to which they were assigned. (Dep. of Wood, Rec., p. 26; Samuel Adams, *ib.*, p. 31.) Besides the lookouts proper, the chief officer was on the bridge, forward of the

pilot-house, keeping a lookout. (Rec., p. 30.) The captain was in the pilot-house awake, and sprang to the wheel as soon as the schooner was reported.

(*c*) There is nothing to warrant the conclusion that the master and pilot were not competent. The latter had not been employed, as he states, permanently on a steamer in the same capacity; but such employment was not necessary to qualify him for the discharge of his duty. He was a coast pilot, and presumably acquainted with this passage, as with other waters on the coast. The occasion, however, did not require, or call for the exerise of, any special knowledge of the peculiarities of the navigation of the passage where the collision took place.

(*d*) The engines were stopped and backed, without a moment's delay, as soon as the pilot saw the schooner, and she was seen as soon as reported by the lookout. She was backing when the collision took place. The engineer states, that the engine had made two or three revolutions. (Rec., p. 25.) The captain says, "the order to port and the ringing of the bells was done as quick as could be without confusion." (Rec., p. 29.)

Nothing more could be done to save the schooner in the emergency, brought, as the vessels were, suddenly and unexpectedly close to each other.

4. *The steamship cannot be blamed or held responsible for the porting her helm, under the circumstances of this case.*

(*a*) In point of fact, this manœuvre did *not* contribute to the collision. The grand mistake of the circuit court, as well as the district court, in this case, was in supposing that it *did*. This mistake, as before mentioned in the statement of the case, occurred by giving effect to the evidence of the witnesses from the schooner, who make it appear that the steamer pursued the schooner by swinging round on a port helm until she came in contact with her. This was the theory to be maintained by the libellant at all hazards; and we know what means he resorted to to establish it. There is little or no doubt that the courts below

were led into this error by believing the evidence of the men from the schooner.

Independently of the discrediting circumstances now disclosed, we confidently submit, that it is physically impossible that what they swear to occurred.

At the very farthest, it was not more than two minutes after the schooner was discovered that the vessels struck. The pilot so testifies. (Rec., p. 28.) The chief officer says, that when the lookout reported the sail, the schooner was once the ship's length off—"*she was right under our bow.*" (Rec., p. 30.)

The lookout says he saw her sails first, and that it was a *very* short time from the time he reported her till they came together. (Rec., p. 27.)

Now, our proposition is, that the course of the steamship could not have been and was not changed during that interval by this movement of the helm.

It requires no expert to prove that a steamship like this cannot be turned about, like a ferry-boat, in two minutes.

The vessels were too close—the time was too short—to enable her to be swung around in the manner supposed. It is proved that the wheel was not touched until the pilot saw the schooner, and he saw her the instant she was reported; and the story of the schooner, in order to be true or possible, requires that the supposed *swinging* should have commenced when Campbell and the other witnesses say it began; and they say it began almost as soon as the steamer, with her full complement of lights, was seen from the schooner. But we *know* that the schooner was not seen by the steamer at the same time, and that she was not seen till the collision was imminent.

There can be no doubt that this whole story about the steamer swinging to her starboard—persistently following up the schooner, and running into her in the manner described—was a pure invention of the schooner's witnesses.

(*b*) But it is not necessary to the cause of the steamship to prove that the manœuvre of porting the helm did not change her course and contribute to the collision: because

it was wholly the fault of the schooner that she placed herself in such a position that it was impossible for the steamer to ascertain, in the time given her for determination and action, the actual course of the schooner.

Upon our premises, that the schooner was without lights, and only a minute and a half or two minutes off when reported, it follows inevitably, that the pilot had no opportunity or time for observation or deliberation. His duty was to act as seemed best to him in the emergency, and take the chances of his action being correct. Naturally he ported the helm for the purpose of going to the right. If he had had time to observe the schooner before action became necessary, (a minute, however, would not have been sufficient,) he would have seen, perhaps, even without a light, that she was heading to the southward, and that, if any change was necessary or prudent, it was to heave the helm to the starboard. But he had no time for an observation. There was no green light on her starboard side, to indicate that her head was across the course of the steamer. He could not tell whether the vessel was at anchor, or whether she was going to the southward or the northward. He could not tell, as the lookout says he could not, what sort of a vessel she was: *it was too thick.* (Rec., p. 27.) All he saw were her sails, and he knew that in an instant there would be a collision. To wait—to postpone action—might be fatal. The steamship could not be turned from her course in an instant. It required time to heave the wheel and to alter the steamer's course. And in this situation—at the very crisis of collision—he ported his helm. It cannot be said, even though there was a mistake, that it is an error for which the steamer is to suffer.

It was not the pilot's fault that he did not know which way the schooner was heading. It was *her* fault that she was there without the steamer's knowing her proximity; and she alone should be visited with the consequences.

But whether it was her fault or not, it was certainly not the fault of the *steamer* that she was not sooner discovered.

If she had displayed a light, she would have been seen

in time to enable the steamer to slow, stop, and back, if necessary, or at least to determine her course, and take the proper manœuvre to avoid her. She cannot complain if her own fault occasioned the mistake of the steamer, even though that mistake was the proximate cause of the injury. And here we recur again to the words of Mr. Justice Grier in the case already cited: "It was the fault of the barque, and not of the steamer, that the vessels were brought into such proximity that such mistakes might be made in the dark, when the pilot of the steamer could neither judge of the distance between the approximating vessels, the rate of their approach, nor the relative angles of their respective courses. It was the duty of the barque, which could see, to give a wide berth to the boat which could not see, and not to leave it in the power of the pilot, by a mistake, in a moment of surprise, to cause a collision." (The Delaware *vs.* The Osprey, 2 Wallace, Jr., 274.)

Our contention, on the whole case, therefore is, that the schooner was in fault in omitting the necessary and proper precaution of exhibiting a light on the night in question; that the steamer was not in fault, as her speed was moderate, and her navigation, in other respects, was properly conducted; that if the porting of the helm was an error, it did not contribute to the collision; and that, if it did, the mistake was one for which she cannot be held responsible, as it was superinduced by the original fault or neglect of the schooner.

The conclusion is, that the schooner was solely to blame, and must bear the consequences of the collision.

Second Proposition.

But if the court are of opinion that the steamship was *not* in fault, it is immaterial to inquire whether there was any negligence, or other fault, on the part of the schooner; as, in that event, the steamer is not liable for any damages sustained by the schooner, and the decree must be reversed and the libel dismissed.

1. Upon a very similar state of facts this court, in the case of

PECK ET AL. v. SANDERSON ET AL., (17 How., 181,)

adjudged the steamer not to be in fault, and, refusing to determine whether the schooner was guilty of any negligence, reversed the decree below, which had condemned the steamer, and dismissed the libel.

In that case the steamer was going 8½ knots an hour. The night was starlight. The schooner was close hauled. She was not seen by the lookout on the steamer till she was only two hundred yards off. The steamer was at once stopped and backed. The schooner contended that the steamer should *also* have changed her course. [In the case at bar the fault imputed to the steamer is that she *did* change her course.] The pilot, however, in the emergency, judged that the proper thing to do was to wait, and this delay produced the collision. This court held he was not to blame. It held also, that it was rather the duty of the schooner to change her course, as she could do so in a shorter space of time than a steamer of the size of *The Columbus*.

Chief Justice Taney, said:

"It is without doubt the general rule, that a sailing vessel should keep her course when approaching a schooner. But this rule presupposes that the steamer discovered, or ought to have discovered, the sailing vessel, when at a sufficient distance to avoid her, by changing her own course. But where, as in the present case, they are brought suddenly and unexpectedly close to each other, and the ordinary rules of navigation will not prevent a collision, it is the duty of each to act according to the emergency, and to take any measure that will be most likely to attain the object." (17 How., 182.)

The contention also was, that as the night was starlight, if the lookout had been watchful, the schooner ought to have been seen at a greater distance. Chief Justice Taney answered that argument as follows:

"There are nights which may properly be called *starlight*, when there is a haze on the surface of the ocean

which obstructs the vision. And the court cannot undertake to say that, in any night, when even the stars are shining, a vessel like the Missouri may be seen at a greater distance than two or three hundred yards, although she is approaching head on, with her sails drawn flat and without a light. *The distance must depend on the state of the atmosphere and vary with it.* And no one can know or form a safe opinion as to the distance at which the schooner might have been seen on the night of which we are speaking, unless he was at the place of collision at the time it happened, or derives his knowledge from persons who were there. And when the witnesses on board the Columbus testify that she could not be seen farther off, there is no reasonable ground for doubting the truth of their testimony. *It is a fact proved by eye-witnesses whose testimony is not impeached.*" (17 How., 181.)

If the steamer in that case was not guilty of negligence, *a fortiori* the steamer in this case was innocent, for *there* the night was starlight and clear, *here* it was dark and hazy; *there* the steamer was going at 8½ knots, *here* only between seven and eight; *there* the pilot did nothing to avoid a collision; *here* he did what he deemed best in the emergency.

Finding no fault imputable to the steamer, and without deciding on the conduct of the schooner, the court reversed the decrees below which had condemned the steamer, and directed the libel to be dismissed.

2. If the court should find that neither vessel committed any fault or negligence, then the rule, that each vessel must bear its own loss in such a case, is applicable; and in that event also the decree must be reversed.

Stainback *et al. v.* Rae, *et al.*, 14 How., 538.
The James Gray *v.* The John Fraser, 21 How., 194.
Union Steam. Co. *v.* New York and Virginia Steam. Co., 24 How., 313.
The Morning Light, 2 Wall., 556.

Third Proposition.

But, if any blame can be attached to the steamer on account of her rate of speed, or in respect to the movement of the helm at the crisis of collision, or for any other rea-

son, the schooner was also in fault, and the case is one for an apportionment of the damages.

The foregoing argument, on the first and second points, covers the principal questions of fact and law involved in this proposition, and need not be repeated.

This court has often announced and applied the rule, that where both vessels are in fault, the damages must be divided.

In *Nelson et al.* v. *Leland et al.*, (22 How., 48,) where a sailing vessel was held in fault for not carrying a steady and fixed light, and the steamer was held also to blame for not stopping and backing, the damages were divided.

In *Rogers et al.* v. *Steamer St. Charles*, (19 How., 109,) the schooner was in fault for removing her light, and the steamer for her rate of speed; and the damages were apportioned.

So, in the case of *Chamberlain et al.* v. *Ward et al.*, (21 How., 558,) the court apportioned the damages.

Also, in the case of *Brig Jas. Gray* v. *Ship John Fraser*, (21 How., 188,) the damages were divided between the colliding vessels.

In the recent case of *The Gray Eagle*, (9 Wall., 511,) where both parties were in fault, both were required to contribute to make good the damages. And the same rule was applied in the more recent case of *The Sapphire*, (11 Wall., 171.)

These are instances, among many found in the books, in which this court has worked out the equities of a case of mutual fault by applying this well-known rule of the admiralty.

If we are wrong in the argument on the first and second propositions above presented, then the decree below must be reversed for the reason stated in the third proposition of this argument.

J. Hubley Ashton,
Of Counsel for Appellant.

U. S. SUPREME COURT.

THE STEAMSHIP "WESTERN METROPOLIS," HIRAM BENNER,
Claimant and Appellant,

vs.

JOHN LOW, JR.,
Libellant and Appellee.

Brief for Libellant appellee

STATEMENT OF FACTS.

This is a libel by the owner of the schooner Triumph to recover for the total loss of the vessel and her cargo which was sunk by the steamship Western Metropolis about four o'clock in the morning of March 17, 1864.

The schooner was bound from Gloucester, Massachusetts, to New York, and had arrived near the Cross Rip Light Ship. The course of the channel between the Cross Rip shoal and the Horse Shoe shoal is about west by north and east by south.

The wind was northwest by west and the schooner was beating against it. She had tacked near the Horse Shoe shoal and stood off close hauled on her starboard tack, heading west southwest, when the lights of the steamer were seen to the westward, she being bound from New York to Boston. The schooner held her course without change and had crossed the channel to a point E. S. E. from the light ship, when she was struck by the steamer's stem on her starboard side near the fore rigging and instantly sunk, carrying down two of her crew.

The pilot of the steamer discovered the schooner from a quarter to a half a mile off, right ahead, and without waiting to see which way she was heading, ported his wheel and kept it aport, aud thus *followed up and struck the schooner*, under whose stern he would otherwise have passed clear.

FIRST POINT.

The decision of the District Court in favor of the libellant was affirmed on appeal by the Circuit Court.

2 Ben. R., p. 399, 7 Blatch C. C. R., p. 216.

No new evidence upon the merits has been presented to this Court.

We suppose that "where the District and Circuit Courts concur in opinion on the facts, and there is testimony supporting their opinion, this Court will not reverse it on doubts raised by the ingenuity of counsel."

Grier, *J.* in the case of The Hypodame, 6 Wall, 223.

SECOND POINT.

But, examining the case anew, no other conclusion can, as it seems to us, be arrived at.

There is far less than the usual contradiction of testimony in this case. That the wind was north-west by west is alleged in the libel, (fol. 2), and admitted by the answer, (fol. 18). That the schooner was heading west south-west close hauled on her starboard tack is proved by Penticost, (fols. 30, 32, 38), and Campbell, (fol. 74), and is not contradicted.

That the schooner kept her course is proved by the same witnesses, (fols. 32, 75 76), and by McDougal, (fol. 51), and no witness pretends that she did change.

That the schooner was seen from a quarter to half a mile off is proved by Daggett, the pilot of the steamer, (fol. 80); and that the steamer's helm was instantly ported, without waiting to see whether that was a change of course which would prevent or cause a collision, is sworn to by Daggett himself, who was the pilot of the steamer, and gave the order, (fol. 90); Hilton, her master, (fol. 93), and both the Adamses, one of whom was the mate, (fols. 97, 101).

The course of the steamer before she saw the schooner is not alleged in the answer, nor does any witness from the steamer testify to it. Campbell, the master of the schooner, judged by her lights, (high light and low light in range), that her course was E. S. E. (fol. 74), and as the course of the channel varies but a point from that, he was probably substantially correct.

THIRD POINT.

We have then the steamer going E. S. E., and the schooner crossing her track at an angle of forty-five degrees heading W. S. W., and the schooner was seen from the steamer and reported as "right ahead."

> "The lookout on the forecastle reported sail right ahead."
>
> Daggett (the pilot), fol. 88.

> "I saw the vessel ahead * * * I reported the vessel. I said, Sail ho! right ahead."
>
> Wood (lookout), fol. 84–5.

> A lookout on the forecastle cried out "A sail ahead."
>
> S. Adams (wheelsman), fol. 100.

> It is true that captain Hilton says, "the first thing I heard was the report "sail on the port bow," (fol. 92.) but he was in his berth at the time, and his statement alone cannot over throw those of his pilot, wheelsman, and lookout, as given above.

It needs no argument to show that in this situation, if the schooner keeps her course, it is the duty of the steamer to go under her stern. She should starboard her helm, or stop till the schooner passed her.

> It was set up in the answer that the schooner changed her course. But there was no attempt on the part of the steamer to sustain that allegation by evidence. The only witness for her who was asked on that point, was Wood, who

is claimed to have been on the lookout, and he says, "I did not see the schooner change her course." (Fol. 85–6.)

FOURTH POINT.

But Daggett, the pilot of the steamer, did not either stop or go under her stern. He ported his wheel at once, and kept it so till the collision.

There is no dispute about the fact of this action of the pilot.

Daggett, 88; Hilton, 92; C. W. Adams, 96; S. Adams, 100.

This manœuvre was the only one which made the collision certain.

If the pilot had starboarded his helm, of course there would have been no collision. If he had only kept his course there would have been none, for in order to reach the schooner he had to run far out of the channel to the right, and struck her when she was east by south or east south east, from the light ship.

Crowell, fol. 66; Campbell, fol. 76.

This manœuvre of porting the helm at once *without waiting to see the course* of the approaching vessel, has

been the cause of several collisions, and in every case the vessel which performed it has been held liable.

The James Watt, 2 W. Rob. 276.
The Northern Indiana, 3 Blatch. 108.
The Cella, 3 Ben. Rep. 171.
The Herman, 4 Blatch. 441.

But the fault of the pilot, in porting his wheel at once without waiting to see what was the course of the other vessel, was not his only fault. Even if that could be excused, what excuse is possible for his persisting in porting until the vessels came together? Surely if he was at all competent for his charge, he must have seen that the schooner was crossing his track to the south, and as soon as he saw that, he must have known that porting was no way to escape a collision. He had at least a quarter of a mile to run. He says it took a minute and a half or two minutes. The engineer says it was long enough to allow him to slow and stop his engine, and to give two or three revolutions back. It would take her about two minutes to run a quarter of a mile at eight miles an hour without slowing. Running twelve miles an hour as she was, and stopping and backing as she did, it would take her about the same time.

Now the schooner was running six miles an hour. In that two minutes then she would run one-fifth of a mile. She would run her length in about twelve seconds. If the steamer then, instead of persisting in her port helm, had changed it for a starboard helm, after having taken an abundance of time to see that the schooner was heading across her track, she would have even then gone under the stern of the schooner. For there can be no possible doubt but that a change of the steamer's helm to starboard would have made as much difference as two-thirds the length of the schooner, which was all that was necessary to clear her.

FIFTH POINT.

The only excuse or pretense of an excuse on behalf of the steamer for this gross blunder of her pilot, is that the schooner was not seen until the steamer was close upon her. To this there are three answers.

a. No matter how close the schooner was, the porting of the wheel was negligence. The pilot, if he knew his business, must have known that with that wind the vessel must be crossing his course, and that it was imperative therefore that before he changed his course he should know which way she was crossing, lest he should follow her up and sink her as he did. But he did not know his business. He was not a licensed pilot, (fol. 90), and was not very familiar with that navigation, being hired for that trip only, apparently as a makeshift. This may account for his negligence in porting the wheel, but cannot excuse it.

b. And the schooner was not too close. Daggett, the pilot of the steamer, says he saw the schooner when she was from a quarter to half a mile distant.

> "I saw the vessel one and a half or two minutes before we struck her. She was not more than one-fourth or one-half a mile off at the time I first saw her.
>
> Daggett, fol. 88.

It is true that Adams, the mate of the steamer, thinks the schooner was only a length off when she was seen (fol. 96). He was

the only witness who was asked on this point, and it is clear that he is wrong, for the steamer had time after she ported to run out of the channel to a point E. S. E. of the light ship (fol. 75). She had time also, after the porting, for the engineer to stop the engine, reverse it, and get two or three revolutions back (fol. 81), which would be impossible in running only her length.

The pilot's judgment of the distance is also sustained by Campbell's evidence that when the steamer opened her red light she was three or four lengths off (fol. 76). Four lengths would be twelve hundred feet which is nearly a quarter of a mile, and she had then been swinging time enough to bring this red light into view again, after it had once disappeared.

The distance of a quarter of a mile gave abundance of time for the steamer to have taken the necessary precautions.

In the Columbine, (2 W. Rob. 27), the vessel was seen three or four lengths off, but the steamer going seven knots was held liable.

In the Northern Indiana, the other vessel was seen four or five hundred feet off, only, but the steamer was held liable.

c. And if the schooner was not seen until she was but a length off, that fact establishes a negligent lookout.

SIXTH POINT.

This last suggestion of negligence in her lookout is met by the steamer in two ways. She claims first that the night was foggy, and second, that though it was not foggy, but a light "could have been easily seen" (ans. fol. 18), the schooner had no light.

We will consider first the question of fog.

a. It is quite curious to see how this fog rises and and thickens before the claimant's eyes, as the case progresses. When the answer was put in (February, 1865), no fog had been seen at all, on the contrary the claimant swears that the "steamer's lights were in plain sight and *could easily have been seen* from the schooner." (Fol. 19).

Next came the depositions taken the first of April, 1868, and in them appears a *haze*— "dark and hazy," (Daggett, fol. 88); Hilton, (fol. 93). Dark and cloudy," (C. W. Adams, fol. 96). "Dark, thick and hazy," (S. Adams, fol. 100).

Next comes the trial on April 21. By this time the haze had thickened to a fog. "Foggy," "a little foggy" says Lighthall, (fol. 80), although the engineer and the other passengers and the store keeper only speak of the night as "heavy," (fol. 82); "thick and heavy," (fol. 83); "dark and thick," (fol. 83).

And on the 23d of April, Wood, the alleged lookout makes his appearance with a fog so thick that the steamer kept blowing her fog whistle, (fol. 85).

The rise and progress of tl is fog is too obvious for it to obscure the view of the Court.

b. Two of the witnesses for the steamer say they could see a light a mile.

C. W. Adams could see it "a mile and a half," (fol. 97), and Samuel Adams "about a mile," (fol. 100). Hilton, it is true, says he could see a light only "from a quarter to half a mile," (fol. 93). Probably his eye sight was poorer than the others, or his interest in the case was greater than theirs. If they could see a light a mile, and if there were also stars to be seen, as Daggett says, (fol. 91), and if Daggett could see the schooner without a light one-quarter to a half mile off, (fols. 89, 90) what then becomes of the fog? It was nothing which prevented them from seeing either ahead or overhead.

c. The evidence of the witnesses for the libellant is enough to overthrow the proof of this fog even if it were far stronger.

The proof shows that the lights of the steamer were seen from the schooner two miles off and more, fifteen or twenty minutes before the collision (Pentecost, fol. 39); (Campbell, two and a half miles fols. 76, 77); ~~(Thompson, one mile, fol. 50).~~ They were seen just after the schooner tacked at the Horse Shoe Shoal, and she ran clear across the channel before she was struck. (Pentecost, fols. 32, 39); (Campbell, fols. 74, 78).

That is no fog, through which this steamer's lights could be seen for two miles and a half. The steamer's answer and the evidence for the libellant agree perfectly.

d. The small boat of the steamer was seen as it came to take the men off from the mast of the sunken vessel, some ten minutes before it reached them. (Pentecost, fol. 38; McDougal, fol. 50; Campbell, fol. 76). Not a witness is called to contradict this, though if it was not true, it could have been contradicted by the whole boat's crew.

e. All the witnesses for the libellant agree in saying that the night was a clear star-light night, in which a schooner's sails could be seen a mile off or more. (Pentecost fols. 29, 38; McDougal, fol. 50; Campbell, fol. 76).

(Thompson, fol. 59). He was master of the Flying Fish, about sixty miles east of the collision. (Crowell, fol. 65) master of the Ada Herbert, near Pollock's Rip, about twenty-five miles east. (Colby, fol. 69) on the same vessel.

f. Unless, therefore, the Court shall give credence to this late rising fog, a fog so remarkable that the lights of the steamer "could have easily been seen from the schooner" (answer, fol. 19) through it, while it entirely shut out the schooner from the view of the steamer, it is clear that there was negligence on the part of the steamer's lookout.

Whether the schooner was seen a quarter to half a mile off as Daggett, the pilot, says, (fols. 88, 89,), or once the length of the steamer distant, as C. W. Adams says, (fols. 97,), in either case there was negligence.

The Louisiana, 21 How, 7.

SEVENTH POINT.

But if the night was so thick that a vessel could not be seen more than a length off, as Capt. Hilton says, (fol. 94), then the steamer was in fault for running too fast; she was running at least eleven miles an hour.

a. She left New York at four o'clock the afternoon before, and in twelve hours had run 180 miles, that is, she had averaged fifteen miles an hour, which is stated to be her highest speed. Wood, (fol. 87); Hilton, (fol. 92). Woodhull, the engineer, says her speed is sixteen knots. (Fol. 81).

b. The weight of the statements of the witnesses is that she was running at that rate.

Hilton says she was going seven or eight miles with the tide. (Fols. 92, 93).

C. W. Adams says she had been going six or seven knots, (fol. 96), and S. Adams says I think we were going through the water seven or eight knots. (Fol. 102).

Woodhull, the engineer, says she was making between seven and eight knots—running slow. (Fol. 81).

Now the tide was two-and-a-half to three knots, (Campbell, fol. 84), or four knots, (Pentecost, fol. 43), which gives a speed of from ten to twelve miles an hour.

But even eight knots was too great a speed if the night was so dark. Eight or ten knots was held too great a speed in Newton *vs.* Stebbins, 10 Howard, 606.

In the case of The Pennsylvania (24 Law Times Rep.), seven knots was held too great, and in the case of The Magna Charta (25 *id.* p. 512), five knots was held too great.

The law is clearly laid down by the House of Lords in the case of the Europa, as follows:

"This may be safely laid down as a rule on all occasions, fog or clear, light or dark, that no steamer has a right to navigate at such a rate, that it is impossible for her to prevent damage, taking all precaution at the moment she sees damage to be possible, and if she cannot do that without going at less than five knots an hour, then she is bound to go at less than five knots."

Jenkins' Rule of the Road and Sea, p. 52.

EIGHTH POINT.

But the steamer claims also that the schooner was navigating without a light, in a night when lights "could have been easily seen," and was therefore in fault.

The question whether she had a light or not is almost the only one as to which there is any contradiction in the evidence. We apprehend that this court, if it comes to consider this question, will agree with the District Judge that the weight of evidence is that she had a light set and burning.

a. In the first place the question is immaterial. (7 Blatch. 216). The statute requiring all vessels to carry lights had not then been passed, and the law as it then stood did not make it the duty of the Triumph to have a light set.

The Blossom, Olcott, Rep. 188.
St. John *vs.* Paine, 10 How.
The Louisiana, 21 How, 7.

b. The absence of a light was not thought of when the answer was put in. The third article of the answer undertakes to set forth the defense, and it is that the schooner changed her course. The fault of not having a light is not alluded to.

c. But the schooner had a light set and burning. (Libel, art. 4, fol. 4; Pentecost, fols. 31, 32–42; McDougal, fol. 50, 51; Campbell, fol. 75). The evidence of the men who set the light and who saw it burning, is more reliable than that of witnesses from a distance. There are but two of the witnesses from the steamer (besides

the lookout), who say they saw no light on the schooner (Daggett, fol. 89, and Sam. Adams, fol. 101). Capt. Hilton says nothing about it, and C. W. Adams confines himself to saying that if there had been a light on the vessel he thinks he should have seen it (fol. 97), and does not say he did not see it.

d. The lookout, Wood, also swears there was no light (fol. 85); but he is utterly unworthy of belief.

1. He swears too strong. He makes the fog so thick that the steamer was blowing her whistle all the time He is the only witness who pretends to have heard a whistle. Captain, pilot, quartermasters, engineer, passengers, none of these heard any whistle.

2. He is a suspicious witness, brought out after the evidence was closed and after proof by the claimant that he could not find the lookouts (fol. 84), and after the case was partly argued. (Fol. 21). Not identified by any one. None of the officers knew his name. He did not know his companion's name.

3. His evidence is otherwise untrustworthy. He swears that there had been no moonlight in his watch, from twelve to four, in which he is contradicted by Pentecost (fol. 51), Crowell (fol. 65), Campbell (fol. 76), Woodhull (fol. 82), and Hilton (fol.

93), and he fixes the steamer's speed at seven or eight knots "by the distance we had come" (fol. 87), although in twelve hours she had come 180 miles (fol. 87–84).

4. The District Judge, before whom he testified orally, was satisfied that he was not worthy of belief. (2 Ben. 402).

NINTH POINT.

An attempt is made to discredit the master and mate of the schooner, by showing that they were interested in the recovery.

This objection does not go to their competency. The statute allowing parties to testify had been passed in 1862, two years before this collision, and the libellant himself was examined in the cause. (Fol. 78).

The facts shown are, that the captain had refused to come on from Gloucester, Mass., to New York, to testify in the cause (having previously been on several times), unless the libellant would promise in writing, as he had before promised verbally, to pay him something on demand after get-

ting money from the case of the Triumph. The libellant therefore, gave him a written promise to pay him seven hundred dollars after getting money from the case.

The mate being about to go to sea on a voyage, the libellant requested him to stay that he might testify as a witness, and agreed verbally to pay him four or five hundred dollars if the suit should be decided in his favor.

We submit that in view of the other facts in the case, there is nothing here that discredits either witness.

a. The court will notice that the captain and mate both testify (and on this matter the claimant has made them his witnesses and cannot impugn their evidence), that no suggestion was ever made to them to deviate from the truth in their evidence in the cause, and that their evidence was not varied from the truth, but was, in all respects, correct and true. The case therefore, is merely one of witnesses having an interest in the recovery, an element which is and always has been almost universal in causes of salvage and seamen's wages and frequent in causes of collision. It calls upon the court to scrutinize their evidence but nothing further.

b. An attempt to discredit the evidence of a witness on this ground ought to be directed to some point. It ought to indicate in what respect his evidence has varied from the truth. It ought to point out how his evidence is opposed by that of the claimant's witnesses, in order to call upon the court to take the story of one in preference to another.

If the evidence of these two men is sustained on all material points by the claimant's witnesses, it does not militate against the truth of what they said, that the libellant agreed to pay them for a service that they were not compelled to render.

The claimant must raise an issue by his pleading and a contradiction by his evidence, before he can claim any benefit from such a consideration.

Now nothing of the sort exists in this case.

c. There is sustantially no contradiction of any fact stated by the libel or the libellant's witnesses, on the part of any witness for the claimant, except on two questions, viz.: whether the steamer was going thirteen knots, and whether the schooner had a light set.

Let us take the allegations of the second article of the libel, and compare them as follows with the evidence.

1. Captain Hilton says the tide was with the steamer, *i.e.*, flood. (Fol. 92).

2. The answer expressly admits that "the wind was N. W. by W."

3. Daggett, the pilot, admits that there were "some few stars." (Fol. 89).

4. No witness pretends that the schooner was not "beating," or that she did not tack

by the Horse Shoe shoal, or that she was not standing "W. S. W. close hauled on her starboard tack." The answer admits this by saying that the schooner "once crossed the track of the steamer and was about again crossing it." (Fol. 18).

5. No witness pretends that the steamer would not, "if she had kept her course, have passed astern of the schooner." No one can pretend that she would not

6. The allegation that the "course of the schooner was not changed" (fol. 4), is denied by the answer, which alleges that "she changed her course." (Fol. 18). But not a witness on the steamer pretends to give any evidence in support of the answer.

The only witness for the steamer who was asked on this point was Wood, the alleged lookout, and he says, "I did not see schooner change her course." (Fol. 85–6).

7. The allegation that the steamer "did not hold her course," but "changed to nearly southeast," is proved by all the witnesses who were navigating the steamer.

Daggett, 88; Hilton, 92; C. W. Adams, 96; S. Adams, 100.

d. As to the question of the steamer's speed, it is to be determined by the evidence of the claim-

ant's witnesses alone. The libellant's witnesses do not testify as to that point. We have already shown that the vessel must have been going at least eleven knots. (Sixth point).

e. The question whether the schooner had a light set is the only one then, as to which the libellant's witnesses are contradicted.

1. The question is an entirely immaterial one. (7 Blatch. 216). As soon as Daggett, the pilot, testified that he saw the schooner "one-fourth to one-half a mile off" the question whether she had a light became of no importance. That moment it became plain that the cause of the collision was not the lack of a light on the schooner, but the wrongful act of the steamer's pilot in porting her helm and chasing the schooner out of the channel.

2. It is equally clear that if she could not be seen at that distance, the steamer was run ning at an unwarrantable rate of speed.

3. It is also plain that the idea of the schoon er's not having a light was not in exist ance when the answer was drawn, or the claimant would not have sworn that the schooner "once crossed the track of the steamer (*i. e.*, before she tacked at the Horse Shoe Shoal), and was about again crossing it." For this statement clearly

implies that the schooner was seen *before she tacked at the Horse Shoe.*

4. It is also plain that it was not thought of by captain Hilton at the time of the collision, or he would not have said he "did not think it was any of our fault." (Fol. 50). Hilton does not deny that he said it, and it is plain that if there had been no light seen on the schooner, that charge would have been made against her from the first.

The Potomac, 8 Wall, 594.

TENTH POINT.

We submit therefore, that the steamer was clearly in fault.

1. In not seeing the schooner sooner, the reasons which she gives for not seeing her sooner not being sustained by theevidence.

2. In porting as soon as the lookout reported "a sail right ahead," instead of waiting to see what course she was on.

3. In not stopping and backing her engine before putting her helm to port, instead of after.

4. In persisting in the port helm, whereby she followed up the schooner, whereas if she had starboarded even after she had ported, she would have gone clear.

So far as the schooner is concerned nothing whatever is shown, whereby she should be charged with fault. She was pursuing her navigation in a proper manner, did nothing whatever to embarrass the steamer, but keeping her course was followed up and sunk when she was out of the direct channel. Her owner has been now for nearly eight years seeking redress for this injury. All the obstacles of the law's delay have been thrown in his way by the claimant of the steamer, although, as we think, it is rare that a collision case comes before the court where the defense is so utterly without merit on the evidence.

We submit that substantial justice will be done by this court if it not only affirms the decree with costs, but gives in addition, interest and damages.

BENEDICT & BENEDICT,

Proctors for Appellers.

U. S. Supreme Court,

The "WESTERN METROPOLIS,"

vs.

JOHN LOW, JR.

SUPPLEMENTAL POINTS FOR APPELLEE.

After examining the points of the appellants, we submit the following additional points:

I.—The appellant meets the charge of fault in the porting of the steamer's wheel, by boldly saying that although the steamer's helm was ported, that had no effect upon her course.

a. It would seem that so remarkable a proposition as that the course of this steamer could not be changed in two minutes, should have some other support than the allegation of counsel. But there is not a particle of evidence to support it. It is only claimed to be "self-evident."

b. If the steamer did in fact make no change of course, is it not most astonishing that with the libel alleging that the steamer "when near said schooner changed to a course nearly south-east," (fol. 3), and with all the witnesses from the schooner testifying to ex-

actly that change, and with the witnesses from the steamer all agreeing that the movement of her wheel was made which would produce that change, still not one of the claimant's witnesses should pretend that the change was not produced? After such "expressive silence" from the witnesses, counsel's statements can hardly avail to establish so extraordinary a proposition.

c. Not only is there no evidence to sustain this proposition, but the positive evidence against it is abundant.

Leaving out the evidence of Captain Campbell on this p int (fol. 74), the fact is proved by Pentecost (fols. 34, 35.)

And Pentecost is not attacked. He stands before the Court on the same footing as the best of the "intelligent and honorable witnesses for the steamer."

If the steamer did not change her course, how comes it that when she struck the schooner, she was out of the channel (fols. 65, 67), "East by South, or East south-east from the Lightship?"

The schooner was crossing the steamer's course, at a speed of six knots. She was seen, as the steamer's witnesses swear, "right ahead," (Point 3,) and a minute and a half or two minutes before the collision. When she was struck, therefore, she must have run about a thousand feet. Take off half for the effect of the tide on her starboard bow, and she must have been five hundred feet from where she was when she was seen "right ahead."

How did the steamer get there if she did not change her course?

d. The appellant's brief says "that this manœuvre swung her round to starboard so as to place her in pursuit of the schooner, and brought about a collision is *not* true; for it was physically impossible, and there is no evidence to prove it except the discredited evidence produced from the schooner." (p. 7.)

We may admire the valor of this method of attacking a difficulty, but in view of the above considerations we cannot fail to be reminded that "the better part of valor is discretion."

II.—But the appellant further claims that the pilot was not in fault in porting, because "he had no time for observation or deliberation." But it is his fault that he took action without deliberation—such action resulting in the collision. Says Judge Taney in Peck *vs.* Sanderson, "it would *evidently have been unwise* to change her course until the course of the approaching vessel was ascertained. She might be approaching at an angle that would clear the steamship, and a change in the course of the latter might *produce a collision instead of preventing it.*" (17 How., 181.)

That is exactly this case. The change in the steamer's course was what produced the collision. The schooner was crossing her course and the pilot ought to have known it. This Court will hardly justify in this case, what it has declared "evidently unwise" in another.

III.—The appellant presses the point that the schooner had no light.

a. Let us look at the probabilities of the case. The steamer was seen a long distance off. "Just after we tacked we saw the steamer" (Pentecost, fol. 32.) "Probably 2½ miles off" (Campbell, fol. 77.) If the schooner had no light up, her crew knew it. If the night was so dark as to make a light a necessity they knew that. And they had abundance of time to get a light up after seeing the steamer before the collision. How account for their failure to do so? Yet the steamer's evidence is, that the schooner *never* showed a light. Is it reasonable to suppose that they should fail to adopt so ordinary and easy a precaution in the face of an approaching peril?

b. Pentecost swears that he put the light up himself when the moon went down (fol. 31.) He is not impeached.

c. The admissions alleged to have been made by the crew of the schooner are all contradicted, not only by themselves. Clark who heard the conversation recollects nothing about a light (fol. 82.) But the admission of Captain Hilton, that there was no fault on the part of the schooner, is not contradicted (fol. 50.)

d. The appellant urges that the fact, that the crew swear the light was in the starboard fore-rigging, is against them, because that is improbable. But if they were *making up* a story, why make up one which was improbable? The truth must be told if it is improbable, but why, if they were telling a falsehood, not relieve it from improbability.

e. The appellant seems to feel necessary to account for the fact that his crew did not see this light, which

he says never existed, and he accounts for it by the *assumption* that the lantern had a dark side. We submit that in the absence of proof on this point, the presumption is that a lantern hung as a signal light has no dark side.

The question was not allowed to rest on assumption in the case of the "James Gray." The dark side was proved.

IV.—The appellant criticises the witnesses for the libellant. But what can he say as to his own witness, Wood?

No man from the steamer could tell who was on the lookout. Brown, one of the owners, swore on April 21st, that he had tried to find the lookout, and could not. (Fol. 83) Two days after he produces a witness, picked up in South Street, who lived in Brooklyn, had been three weeks in the City, "had talked with nobody," and told so improbable a story that the Judge, who heard him testify, did not believe a word he said.

If either case is "tainted" with false testimony, it is the claimant's case.

R. D. BENEDICT,

Counsel for Appellee.

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